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No. 22218

IN THE

3503
3503
United States Court of Appeals

FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellant,

vs.

UNION BANK, a Corporation,

Appellee.

On Appeal From the United States District Court
for the Central District of California.

APPELLEE'S BRIEF.

FILED

JAN 10 1968

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TOPICAL INDEX

	Page
Jurisdiction	1
Statement of the Case	1
Argument	6
1. The Demand Is Not Relevant to the Charge and Is Not in Compliance With 42 U.S.C. § 2000e-8(a)	6
2. The Demand Is in Excess of the Commis- sion's Jurisdiction	10
3. The Demand Is an Unwarranted Intrusion Into the Privacy of the Bank's 2100 Em- ployees and an Unreasonable Interference With the Business of Petitioner	12
Conclusion	14

TABLE OF AUTHORITIES CITED

Cases	Page
Lee v. Federal Maritime Board, 284 F. 2d 577	14
Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 66 S. Ct. 494, 90 L. Ed. 614	15

Statutes	
Evidence Code, Sec. 210	7
Labor Code, Sec. 1197.5	10, 12
Labor Code, Sec. 1197.5(a)	11
Labor Code, Sec. 1197.5(b)	11
Labor Code, Sec. 1197.5(c)	11
Labor Code, Sec. 1197.5(f)	11
Labor Code, Sec. 1197.5(i)	11
Labor Code, Sec. 1199(d)	11
Unemployment Insurance Code, Sec. 1256	12
United States Code, Title 42, Sec. 2000e-5(b)	10
United States Code, Title 42, Sec. 2000e-8(a)	6
United States Code, Title 42, Sec. 2000e-9	9

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APPELLEE'S BRIEF.

Jurisdiction.

The statement of Jurisdiction in Appellant's Brief is accurate.

Statement of the Case.

The facts which give rise to this cause are as follows:

On January 6, 1967, Marquerite M. Buckley, a female lawyer employed in the Law Division of Union Bank since 1962, resigned her position as Assistant Counsel for the purpose, as she stated in writing, of "seeking other employment" [T. R.* 9].

On February 20, 1967, Miss Buckley filed a Charge of Discrimination because of her Sex with the Equal

*"T. R." refers to the Transcript of Record.

Employment Opportunity Commission [T. R. 6]. On the form Charge, Miss Buckley stated the discrimination to be

“Discrimination in upgrading on the job; men doing the same job had corporate titles and higher salaries. In September of 1965, I submitted my resignation to my superior, J. O. Wood, General Counsel, based on discriminatory practices with respect to title and salary. I withdrew it on his promise to remedy the matter. In August of 1966, a new man who had no legal experience and had just passed the California State Bar was given a higher title. All male attorneys now had the title of associate counsel although we were all doing the same work. Again, promises were made to remedy the situation. On January 6, 1967, I submitted my resignation because nothing had been done over 1½ years.” [T. R. 6].

On March 8, 1967, the Commission served the Bank with a copy of the Charge [T. R. 13]. An Investigator of the Commission interviewed on that date Mr. Nachreiner, Executive Vice President, and also Mr. Wood, the General Counsel of the Bank [*Ibid.*].

On March 16, 1967, the Investigator interviewed, for three hours, Mr. William Blakely, the Vice President in charge of Personnel, as well as Mr. Sanders, the Vice President in charge of the personnel of the Law Division [*Ibid.*].

On March 21, 1967, the Investigator again interviewed Mr. Sanders, this time for one and one-half hours [*Ibid.*].

On April 4, 1967, the Investigator interrogated, without previous appointment, an employee of the Bank [*Ibid.*].

On April 5, 1967, the Investigator requested a "tour" of each physical area in the Bank's headquarters and in each of the Bank's Los Angeles offices where both males and females work [T. R. 15].

On April 6, 1967, the Investigator again interviewed Mr. Wood [T. R. 13].

On April 10, 1967, the Investigator interviewed Messrs. Ladner, Korngut and Broidy of the Bank [*Ibid.*].

Pursuant to the request of the Investigator, the Bank has supplied [T. R. 7, 13, 14] to the Commission, among other documents and oral information, the following:

(1) Employer Information Report for the 2,198 employees of the Bank, broken down by Sex, Minority Group and Occupation, *but without identification by name.*

(2) The complete personnel files of Miss Buckley and her contemporaries in the Law Division.

(3) The Law Division Organizational Chart.

(4) The Law Division Job Specification.

(5) The Payroll Department cards of Miss Buckley and of her contemporary male lawyers.

(6) IBM tab run for March, 1967 reflecting statistics of attorneys in the Law Division.

(7) Memorandum of Mr. Korngut regarding Miss Buckley's performance.

(8) Memorandum Re Minority Groups Employment.

(9) Pamphlet Re Employee Relations and Practices.

(10) Example of litigation case handled by Miss Buckley.

The Bank suggested to the Investigator that he obtain Miss Buckley's permission to interview her psychiatrist who has attended her for several years and also to interview the psychologist who rendered a report to the Bank concerning Miss Buckley [T. R. 14]. The Commission evinced no interest in doing so.

On March 16, 1967, the Investigator had requested to see an IBM Tab Run setting forth the *names*, as well as sex, salary, job and title of the Bank's 2,198 employees [T. R. 14]. The Investigator admitted then to Mr. Sanders that the request was in the nature of a "fishing expedition" [T. R. 14].

On March 21, 1967, the Investigator repeated his request for the Tab Run, stating that he needed the names and addresses therein of the 2,100 or more Bank employees so that he could interview whomsoever among them he chose [R. T. 14]. The Bank declined [T. R. 14] by letter dated March 23, 1967 [R. T. 7-9].

On March 31, 1967, the Commission formally demanded [T. R. 8] two additional types of documents:

(1) The IBM Tab Run reflecting not only jobs, salaries and titles by sex, but also the names of the 2,198 employees of the Bank.

(2) "All other records" which would enable the Commission to determine whether or not there was probable cause for the Commission to believe the Bank discriminated against Miss Buckley.

The Bank declined to produce these documents for the reasons stated in its letter of April 4, 1967 [T. R. 10], and petitioned for an Order quashing the Demand. An Order was obtained from the District Court quashing the Demand for both categories of documents [T. R. 50-51].

Although the Commission has appealed from the entire Order, it has not argued in its Brief that the Court's quashing of the second Demand was error. That all-inclusive second Demand would require the Bank to determine what the Commission would consider to be evidence of probable cause. Since that second Demand is so patently improper, we assume that the Commission no longer is contending that portion of the District Court's Order is error.

Here, there were seven or eight highly educated persons practicing their profession in a Law Department. How bank practices with respect to clerks or typists would be of consequence to whether a female lawyer was discriminated against requires considerable imagination.

Suppose a female lawyer in a regional law office of General Motors complained of sex discrimination. Would the law consider as “relevant” what G.M.’s practices were with respect to all its female employees *vis a vis* their male counterparts? Should the Commission be entitled to interrogate each of G.M.’s employees? In a private suit by such a lawyer, could she *depose each employee* of G.M. in an effort to prove that a “pattern of action” could be

“drawn from the totality of facts, the conglomerate of activities, and the entire web of circumstances presented by the evidence on the record as a whole”? (Appellant’s Brief p. 8).

Or, if a law clerk of this Court alleged discrimination on account of his or her sex, would the employment practices of the Federal Government as to all of its employees become “relevant to the charge”?

We submit that if the foregoing questions are answered negatively, the Order of the District Court must be affirmed. Conversely, if the Order is reversed, this Court would be setting a precedent for the broadest possible scope of investigation of charges similar to that of Miss Buckley.

Indeed, it may be that all the Commission seeks in its appeal is just such a precedent, for as it admitted below:

“The Commission does not contend . . . that the data print-out sheets will prove or disprove Miss Buckley’s charge.” [T. R. 31].

It should be noted, moreover, that the requested data itself would supply the Government with little, if anything, more than it already has from the Bank by way of statistics. Not only did the Bank submit statistical information to the Commission about its 2,198 employees by sex, by occupation and by minority group [R. T. 17], but as the Commission also admitted below,

“information similar to that contained on IBM data processed sheets would be routinely supplied by the Bank to numerous federal agencies . . .” [T. R. 12].

Hence, if the Commission has any true use for the IBM Tab run, it will be in order to obtain the *names* thereon of the Bank employees. The evidence before the District Court was that the Commission’s Investigator stated he needed the data in order to get the names and addresses so that he might interview whomsoever he chose and engage in a general “fishing expedition” into the general employment practices of the Bank [T. R. 14].

In the light of the evidence before the District Court, it is difficult to see how it erred in quashing the Demand of the Commission.

2. The Demand Is in Excess of the Commission's Jurisdiction.

Before there can be any charge filed with the Commission, any complainant first must exhaust his State remedies. As stated in 42 U.S.C. § 2000e-5(b):

“In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law.”

California Labor Code § 1197.5 is such a State Law. It provides

“(a) No employer shall pay any female in his employ at wage rates less than the rates paid to male employees in the same establishment for the same quantity and quality of the same classification of work; provided, that nothing herein shall prohibit a variation of rates of pay for male and female employees engaged in the same classification of work based upon a difference in seniority, length of service, ability, skill, difference in duties

or services performed, whether regularly or occasionally, difference in the shift or time of day worked, hours of work, or restrictions or prohibitions on lifting or moving objects in excess of specified weight, or other reasonable differentiation, factor or factors other than sex, when exercised in good faith.”

Section 1197.5(b) makes the violating employer liable to the female employee; § 1197.5(c) requires the Division of Industrial Welfare to administer the Section; § 1197.5(f) provides for a civil suit by the Division; § 1197.5(i) allows the female a civil action; § 1199(d) makes the employer’s violation a criminal offense.

The activity complained of by Miss Buckley was exactly that prohibited by § 1197.5 (a). Miss Buckley’s charge stated:

“Discrimination in upgrading on the job; *men doing the same job* had corporate titles and higher salaries.” [T. R. 6].

Yet, there was no showing of exhaustion of any State remedy. Moreover, the Charge itself affirmatively states it was filed less than 60 days after her resignation was submitted [T. R. 6].

Hence, the Commission exceeded its jurisdiction by entertaining the Charge before complainant exhausted her State remedies.

3. **The Demand Is an Unwarranted Intrusion Into the Privacy of the Bank's 2100 Employees and an Unreasonable Interference With the Business of Petitioner.**

What would make the Demand an “unwarranted intrusion” or an “unreasonable interference”? If the charges of Miss Buckley were utterly baseless, that fact would make it unreasonable for the Commission further to interview Bank employees and thus interfere with the employees as well as the Bank. What showing can the Bank make regarding Miss Buckley's charges?

The most helpful and relevant precedent to cite to this Court is a Decision in a case before the California Unemployment Appeals Board, No. BK-5697, Burbank Field Office, dated 6-16-67. This case concerned whether Miss Buckley was disqualified for benefits under § 1256 of the California Unemployment Insurance Code because she left her most recent work voluntarily without cause. If there had been a violation by the Bank of § 1197.5 of the Labor Code, there would have been sufficient good cause for Miss Buckley to have left the Bank without being barred from benefits. However, the Referee ruled against Miss Buckley's claim of discrimination, stating:

“The claimant was employed first as a Law Administrator. She was then promoted to Assistant Counsel. She resigned in August 1965 because the employer had not promoted her to Associate Counsel. The employer induced the claimant to withdraw her resignation because she was com-

petent and skilled in the field of establishing and supervising procedures for loan documentation.

“The employer at that time promised the claimant that she would be considered for promotion to Associate Counsel. The employer kept that promise. On February 9, 1966, the Vice-President who was the claimant’s supervisor recommended that she be promoted to Associate Counsel. The claimant knew that her selection must be approved by the Board of Directors. The Board of Directors did not approve her promotion to Associate Counsel. In good faith, however, the employer had considered the claimant for promotion, as was promised to her in August 1965. She then received a pay increase of \$600 per annum. There is not evidence that the claimant was given any definite and specific promise which the employer later did not keep.

“The evidence does not establish that the employer in any way discriminated against the claimant because of her sex. The referee after considering the demeanor of the witnesses, their manner of testifying, the character of their testimony, the capacity of the witnesses to recollect and their possible bias, interest or motives, finds that any distinction in grade, title, conditions of employment, or rate of pay between the claimant and the other attorneys of the law department of the employer was based upon their relative ability, seniority, skill, difference in duties or services performed. Any such distinction between the claimant’s working conditions, title or rate of pay and the working conditions, titles or rates of pay of

the other attorney members of the employer's law division was based upon a reason other than the fact that the claimant is a female and the other attorney employees are of the opposite sex. The skill, effort and responsibility of the claimant was not equal to the skill, effort and responsibility of the other attorney employees of the employer.

“Consequently, the referee concludes that the claimant quit her job because of her basic dissatisfaction with her progress as an employee. Her progress, or the lack thereof, was not connected in any way with the fact that she is a female. The claimant has not established a real, substantial and compelling reason for quitting her work of such nature as would cause a reasonable person genuinely desirous of retaining employment to take similar action. The claimant quit her work without ‘good cause’ within the meaning of section 1256 of the code.”

We believe that the foregoing decision is adequate precedent to show that further investigation of Miss Buckley's charge would be useless and unnecessary and thus an unwarranted intrusion into the privacy of the Bank's employees and an unreasonable interference with the business of the Bank.

Conclusion.

This Court stated in *Lee v. Federal Maritime Board*, 284 F. 2d 577, 581 (9 Cir. 1960),

“An administrative subpoena may be held unenforceable on the ground that the data called for is irrelevant to the purposes of the inquiry.”

This Court gave as authority, *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 66 S. Ct. 494, 90 L. Ed. 614 (1945). We can find no more fitting a summation of the point involved herein than Justice Murphy's dissenting opinion therein:

“Administrative law has increased greatly in the past few years and seems destined to be augmented even further in the future. But attending this growth should be a new and broader sense of responsibility on the part of administrative agencies and officials. Excessive use or abuse of authority can not only destroy man's instinct for liberty but will eventually undo the administrative processes themselves. Our history is not without a precedent of a successful revolt against a ruler who ‘sent hither swarms of officers to harass our people.’

“Perhaps we are too far removed from the experiences of the past to appreciate fully the consequences that may result from an irresponsible though well-meaning use of the subpoena power. To allow a non-judicial officer, unarmed with judicial process, to demand the books and papers of an individual is an open invitation to abuse of that power. It is no answer that the individual may refuse to produce the material demanded. Many persons have yielded solely because of the air of authority with which the demand is made, a demand that cannot be enforced without subsequent judicial aid. Many invasions of private rights thus occur without the restraining hand of the judiciary ever intervening.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITIE COMMISSION, APPELLANT

v.

UNION BANK, A CORPORATION, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

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INDEX

	Page
Jurisdiction	1
Statement of the Case	3
Argument	5
I. Under the standards normally applied to administrative agencies the information sought by the demand is "relevant" to the investigation of the charge filed with the Commission.	5
A. The information contained in the print-out is relevant for the purpose of determining whether there is reasonable cause to believe that the charging party was discriminated against because of her sex.	8
B. The information contained in the print-out is relevant for the purpose of framing an appropriate remedy in the event the Commission finds merit in the charge.	10
II. The print-out is relevant to resolving the conflict between the charging party's claim that female employees were discriminated against in upgrading because of their sex and the bank's denial of that claim.	13
Conclusion	14
Statutory Appendix	17

AUTHORITIES CITED

Cases:	Page
<u>Action Wholesale Inc., d/b/a A.L. French Co., 145 NLRB 627</u>	9
<u>Aeronca Mfg. Co. v. N.L.R.B., ___ F.2d ___, 66 LRRM 2574, Nov.1, 1967 (C.A.9)</u>	8
<u>Anthony v. Brooks, 65 LRRM 3074 (U.S.D.C., Ga., June 9, 1967)</u>	12
<u>Detweiler v. Walling, 157 F.2d 841, (C.A. 9, 1946)</u>	6
<u>Hall v. Werthan Bag Corp. 251 F. Supp. 184, (U.S.D.C., M.D., Tenn., 1966)</u>	9,10,12
<u>Hunt Foods v. F.T.C., 286 F.2d 803 (C.A. 9, 1961)</u>	7
<u>I.C.C. v. Baird, 194 U.S. 25, 44 (1903)</u>	13
<u>Moody v. Albermarle Paper Co., 271 F. Supp.27 (U.S.D.C., E.D.N.C., 1967)</u>	12
<u>N.L.R.B. v. Local Union No. 85, 274 F.2d 344 (C.A. 5, 1960)</u>	11
<u>N.L.R.B. v. Mrak Coal Co., 322 F. 2d 311, (C.A. 9, 1963)</u>	9
<u>N.L.R.B. v. West Coast Casket Co., 205 F.2d 902 (C.A. 9, 1953)</u>	9
<u>Quarles v. Phillip Morris, No. 4544 (U.S.D.C., E.D. Va., Sept. 26, 1966)</u>	12
<u>Robinson v. Lorillard Co., No.C-141-G-66 (U.S.D.C., M.D.N.C., 1967)</u>	12
<u>United States v. Morton Salt, 338 U.S. 632 (1960)</u>	6

Statutes:

78 Stat. 253, 42 U.S.C. Section 2000e-et seq.

Section 706(a)	2,3,10,12
Section 706(e)	12
Section 709(a)	2,5
Section 710(a)	2,4

61 Stat 136, 73 Stat. 519, 29 U.S.C. 151 et seq.

Section 10(c)	10,11
---------------------	-------

Miscellaneous:

Davis Administrative Law, Vol. 1	6
88th Cong. 110 Congressional Record	7
88th Cong. Second Session, 110 Congressional Record	7,8

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22218

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
APPELLANT

v.

UNION BANK, A CORPORATION,
APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

JURISDICTION

This case is before the Court upon an appeal from an order of the United States District Court for the Central District of California granting appellee's petition for

an order setting aside a Demand for Access to Evidence duly served by the Equal Employment Opportunity Commission 1/ upon appellee pursuant to the provisions of Section 709(b) and 710 of the Civil Rights Act of 1964 (42 U.S.C. §2000e-8(b), 9) and the denial of the Commission's cross-petition for an order compelling appellee Union Bank (hereinafter designated as the employer or the bank) to comply with such demand. (C.A. 50-51) 2/

1/ Section 706(a) of Title VII (42 U.S.C. Sec. 2000e-5(a)) provides in relevant part. "Whenever it is charged in writing under oath by a person claiming to be aggrieved ...that an employer ... has engaged in an unlawful employment practice in the Commission shall furnish such employer ... with a copy of such charge and shall make an investigation of such charge ... If the Commission shall determine after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such unlawful employment practice ...

2/ References designated "C.A." are to pages of the transcript of the record in the court below reproduced as an appendix to this brief.

STATEMENT OF THE CASE

The charge in this case was filed on February 20, 1967, by Marguerite M. Buckley, pursuant to the provisions of Section 706(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(a)). Miss Buckley who had been employed as an attorney in the legal department of appellee charged that the bank had discriminated against her because of her sex, in violation of the provisions of Title VII of the Civil Rights Act of 1964. (C.A. 6). The charge was duly served upon the employer on March 8, 1967, and an investigation was undertaken by LeJean T. Clark in his capacity of Equal Employment Officer of the Equal Employment Opportunity Commission. (C.A. 35). During the course of the investigation, Mr. Clark asked for and received various kinds of documents needed for his investigation of the charge. (C.A. 35). Among the items requested by Mr. Clark was an IBM data process print-out, which listed the names, job code numbers, office or department and salaries of the bank's male and female employees. (C.A. 36). This was necessary to the investigation as it would provide an accurate comparison between the wage rates and positions of male and female employees, and shed light on conflicting assertions made by the charging party and the bank. (C.A. 36). Executive

Vice-President Ben J. Nachreiner, on March 8, 1967, showed Mr. Clark a sample print-out and agreed to furnish one for the Commission's examination (C.A. 35-36). The bank later refused to do so. (C.A. 10-11).

On March 31, 1967, Mr. Clark served a Demand for Access to Evidence upon the bank. The demand requested, inter alia (C.A. 8-9):

1. Personnel records, or data processed print-out sheets, listing names, sex, job title, job code numbers, office and/or department designation, and salaries for all positions in which men and women were employed by Union Bank in February, March, April, and December, 1966.

On April 20, 1967, the bank filed its petition to set aside the demand pursuant to the provisions of Section 710(b) of Title VII (42 U.S.C. Section 2000e-9(b)). (C.A. 2-5). On May 15, 1967, the Commission filed its response to the petition, praying the court to deny the bank's petition and order the bank to comply with the demand. (C.A. 31). On May 24, 1967, the district court issued its order setting aside the demand, on the ground that the IBM data process print-out (hereinafter "print-out") went "far beyond the

standards of relevance set by 42 U.S.C. §2000e-8(a) "

(C.A. 51) . 3/

ARGUMENT

- I. Under the standards normally applied to administrative agencies the information sought by the demand is "relevant" to the investigation of the charge filed with the Commission.
-

Section 709(a) (42 U.S.C. §2000e-8(a)) provides that

".... the Commission or its designated representatives shall at all reasonable times have access to, for purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to charges under investigation." (Emphasis supplied).

Prior to the instant proceeding there had been no specific judicial interpretation of the language of Section 709(a). There is, however, a wealth of authority dealing with the investigatory powers of administrative agencies. These

3/ It's undisputed that the print-out would provide data permitting a comparison between the positions and salaries of male and female employees.

authorities were ignored by the district court.

The broad legal principle to be applied to the investigative powers of an administrative agency is stated by Davis as follows: " recent cases permit such roving inquiries to whatever extent seems necessary to make the power of investigation effective." 1 Davis, Administrative Law 183.

In the words of this Court, "The only limitation upon the scope of the Administrator's inquiry is that the records demanded be reasonable relevant to the matter in issue," 4/

The Supreme Court speaking to the issue in United States v. Morton Salt, 338 U. S. 632 (1950) stated, " it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." (supra at p.652).

In sum, "the test is relevance to the specific purpose, and the purpose is determined by the investigators." Davis, 1 Administrative Law, supra at pp 188-189.

The legislative history of Section 709 makes it completely clear that the scope of the Commission's investigatory

4/ Detweiler v. Wailing 157 F. 2d 841, 843 (C.A. 9, 1946), cert. denied 330 U. S. 819 (1947)

powers was to be as broad as those enjoyed by any administrative agency. In the House bill, Section 709 specifically referred to the range of investigatory powers vested in the Federal Trade Commission. 5/ (H.R. 7152 88th Cong. 110 Cong. Rec. 2709). When the House bill was sent to the Senate, Senator Dirksen raised questions concerning both the scope of the investigatory power incorporated in the House bill and the methods by which the investigatory power would be enforced by the Commission. These questions were answered by Senator Clark, one of the floor managers of the bill in the Senate. (88th Cong. Second Session, 110 Cong. Rec. 7216). In the leadership compromise which preceded Senate passage of the bill, Senator Dirksen offered and secured certain changes in language of the statute relating to Commission investigations. (88th Cong. Second Session, 110 Cong. Rec. 12819-20). However, these changes concerned only the method of enforcing the investigatory authority, and did not limit in any fashion the scope of the authority to investigate encompassed in the House bill. This fact was

5/ This Court in a leading decision construing the Federal Trade Commission Act concluded that the investigatory power of the Federal Trade Commission was very broad. Indeed, broad enough to reach "matters that might have been made the object of complaint." Hunt Foods v. FTC, 286 F. 2d 803, 809 (C.A. 9, 1961), cert. denied 365 U.S. 877

made uncontravertably clear by Senator Dirksen himself who, three days after the bill passed, introduced a comparison between the original House bill and the bill that was finally enacted as the Civil Rights Act of 1964. Commenting on Section 709 the comparative analysis states that the subpoena power accorded the Commission is the "Same, [as the House bill] although the manner of enforcing the subpoena is altered in form, but not in substance ..." (88th Cong. Second Session, Vol. 110 Cong. Rec. p. 16003)

A. The information contained in the print-out is relevant for the purpose of determining whether there is reasonable cause to believe that the charging party was discriminated against because of her sex.

Contrary to the statement of the court below, the "existence or nonexistence of discrimination in other departments of the bank" is relevant to the question of discrimination among the professional personnel of the law division. (C.A. 51). This Court has often pointed out that an inference of discrimination may be "drawn from the totality of facts, the conglomerate of activities, and the entire web of circumstances presented by the evidence on the record as a whole." Aeronca Mfg. Co. v. NLRB, _____ F.2d _____, decided Nov. 1, 1967, 66 LRRM 2574, 2576 (C.A. 9). Thus, this Court has

sustained Labor Board findings of discrimination in light of evidence concerning the employer's over all conduct. In NLRB v. West Coast Casket Co., this Court stated (205 F.2d 902, 907 (1953): 6/

Smith's discharge should be viewed in the total context of respondent's conduct during the union campaign, which discloses anti-union sentiment expressed in part in a pattern of action which we have determined in the earlier portion of this opinion to involve unfair labor practices.

Discrimination on the basis of sex is by definition a class discrimination. Cf. Hall v. Werthan Bag Corp. 251 F. Supp. 184, 186 (U.S.D.C., M.D. Tenn., 1966). In this respect it is analogous to discrimination on the basis of union affiliation. Thus, evidence of the employer's "pattern of action," is plainly relevant to the Commission's determination of whether reasonable cause exists to believe that the employer discriminated against the charging party

6/ Accord: NLRB v. Mrak Coal Co., 322 F. 2d. 311 (CA 9, 1963); Action Wholesale Inc. d/b/a/ A.L. French Co. 145 NLRB 627,628, 342 F.2d 814 (C.A. 9, 1965).

because of her sex. 7/

B. The information contained in the print-out is relevant for the purpose of framing an appropriate remedy in the event the Commission finds merit in the charge.

The print-out in addition to providing evidence relevant to the issue of whether the charging party was a victim of discrimination, would be crucial to the Commission in the carrying of its statutory duty to "endeavor to eliminate any such alleged unlawful employment practice...." 8/

As the court noted in Hall v. Werthan Bag, (supra, at 187-88,) the enforcement procedure of Section 706 contemplates that the Commission, in the public interest shall provide relief which goes beyond the limited interests of the charging party. In this respect, Section 706(a) retained its similarity to Section 10(c) (29 U.S.C. Sec. 160 (c)) of the Labor Act which formed the model for Title VII. Under

7/ For example, the print-out could show that the wages paid male employees are always or almost always higher than those paid female employees holding the same job title or very similar jobs. Such information tends to support the inference that Miss Buckley was discriminatorily paid at a lower rate than male employees providing legal services for the bank. On the other hand, if a comparison between male and female rates for similar jobs showed no pattern of lower rates for female employees, such evidence would tend to support the bank's claim that Miss Buckley's problems flowed from her own deficiencies as an employee rather than from a practice of discrimination.

8/ Section 706 (a) of Title VII (42 U.S.C. 2000e-5(a)).

Section 10(c) the Labor Board is required to seek to eliminate the "practice" of discrimination. Looking then to a comparable case arising under the Labor Act, there being no judicial precedent under Title VII, we see that where a specific act of discrimination was committed pursuant to a general practice of discrimination the Labor Board has issued and obtained judicial enforcement of orders enjoining both the specific act of discrimination found and the practice from which it flowed. Thus, in NLRB v. Local Union No. 85, 274 F. 2d 344 (C.A. 5, 1960), cert. denied, 366 U.S. 908 (1961), the Labor Board found that an individual, one Gasaway, was discriminated against by being denied employment for failure to secure a union referral and that such discrimination occurred as result of discriminatory practices of the union and the employer. The Board's order required, inter alia, that the violator cease and desist from discriminating "against J.P. Gasaway, or any other employee or applicant for employment...". 274 F2d at p. 346.

An examination of conciliation agreements which have been entered into by the Equal Employment Opportunity Commission shows that, like orders of the Labor Board, they require the elimination of the practice of discrimination, where

such a practice exists, as well as providing specific relief for the charging parties. A conciliation agreement which was limited solely to providing relief for the charging party's specific complaint, assuming arguendo that the evidence before the Commission supports the allegation of discrimination, would be inconsistent with the requirements of Section 706(a).

In sum, in order for the Commission to effectively carry out its statutory function of endeavoring to eliminate discriminatory practices it is imperative that the Commission have knowledge of the bank's employment practices as regards its female employees. The print-out sought by the demand will provide information relevant to the purpose of proving a remedy should a violation be found, and thus is clearly within the ambit of the Commission's investigatory powers as set forth in Section 709(d) of Title VII. Q.

A. In those cases where conciliation fails and litigation ensues under Section 706(e), the complaints filed have normally been cast as class actions. See, e.g., Gill v. Werthan Bag. Supr.; Anthony v. Brooks 55 LRM 3073 (U.S. D.C. Ga., June 9, 1967); Moody v. Albemarle Paper Co., 271 F. Supp. 27 (U.S.D.C., S.D. N.C., 1967); Robinson v. Forillard Co., No. c-141-G-66 (U.S.D.C., M.D., W.C., Jan. 26, 1967); Quarles v. Phillip Morris Inc., No. 4544 (U.S.D.C., E.D. Va., Sept. 26, 1966). In such cases evidence bearing upon the employer's practices via a class would plainly be relevant to the proceeding. It would be anomalous, indeed, if the district courts which like the Commission have the authority to remedy a "practise" of discrimination, were able to accept as relevant, evidence, which for purposes of the proceeding before the Commission, would be deemed not relevant.

- II. The "print-out" is relevant to resolving the conflict between the charging party's claim that female employees were discriminated against in upgrading because of their sex and the bank's denial of that claim.
-

The charge filed in this case alleges inter alia that the respondent employer discriminated against female employees "in upgrading on the job; men doing the same job had corporate titles and higher salaries." (C.A. 34). While the balance of the charging party's statement concerns the discrimination which she suffered it is clear that the charge encompasses an alleged general practice of denial of equal opportunity to female employees. This is made all the more apparent by the charging party's letter to the Commission of March 29, 1967, wherein the charging party states, "The aforementioned Complaint was filed because of the practices of the Bank toward women in the bank generally as well as my own problems with it It's my impression that a check of the bank records would reveal salary discrepancies and further reveal that most women who have been promoted were on the job for lengthier periods of time than men who were doing the same jobs and received similar promotions." (C.A. 34). In short, the charge alleges a specific instance

of discrimination which flowed from a pattern of general discrimination on the basis of sex. The bank specifically denies any discrimination. (C.A. 15) And while the bank does not contradict the charging party's claim that male employees with less experience than the charging party were given higher salaries and higher titles, the bank appears to be saying that this was due to deficiencies in the charging party rather than any pattern of discrimination against females (C.A. 13-14, 32)

Thus, a key point in dispute is whether the bank pays female employees lower salaries and accords them lesser titles for performing comparable work. The bank, by its own response to the charge, has raised this as an issue in the case. The data contained in the print-out relates directly to this issue and is therefore relevant evidence because of "its legitimate tendency to establish a converted fact." I.C.C. v. Baird 194 U.S. 25, 44 (1903).

CONCLUSION

The print-out sought by the demand and refused by the bank is subject to examination and copying by the Commission

under the provisions of Section 709 and 710 of Title VII because:

1. the print-out is relevant to the investigation under the general standards of relevancy applicable to the investigatory powers of administrative agencies and, as shown by the legislative history of the title clearly within the ambit of the investigatory powers vested in the Commission by Congress
2. the data contained in the print-out may reveal a general pattern of discrimination on the basis of sex, which may be utilized as part of the whole record tending to support an inference of discrimination with respect to the instant charge
3. if the Commission concludes that there is merit to the charge, such data relating to the employer's practices would be critical to the framing of an appropriate remedy and
4. the data contained in the print-out bears directly upon matters in controversy in the case. Accordingly, the Commission submits that the court below erred in granting the bank's petition to set aside the demand and denying the Commission's cross petition for enforcement thereof. The Commission respectfully

prays this Court to issue an order setting aside the order of the court below and remand the case to the district court with instructions to issue an order compelling the bank to comply with the demand.

Respectfully submitted,

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Washington, D.C.

December, 1967

STATUTORY APPENDIX

The relevant provisions of Title VII of the Civil Rights Act of 1964, (78 Stat. 253, 42 U.S.C. 2000e, et seq.) are as follows:

Prevention of Unlawful Employment Practices

Section 706(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$1,000 or imprisoned not more than one year.

.....

Section 706(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the

Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance.

.....

Section 709(a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated, or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

.....

Section 710(a) For the purposes of any investigation of a charge filed under the authority contained in section 706, the Commission shall have authority to examine witnesses under oath and to require the production of documentary evidence relevant or material to the charge under investigation.

.....

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73Stat. 519, 29 U.S.C. Sec.

151, et seq.) are as follows:

.....

Section 10(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and disist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act:

.....

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

Russell Specter,
Senior Attorney,
Equal Employment Opportunity
Commission

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing
brier for the Equal Employment Opportunity
Commission have been served by official
United States Airmail, postage prepaid,
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No. 22218

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Appellant,

vs.

UNION BANK, a Corporation,

Appellee.

On Appeal From the United States District Court
for the Central District of California

BRIEF IN SUPPORT OF MOTION FOR REHEARING

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

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On Appeal From the United States District Court
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BRIEF OF APPELLANT IN SUPPORT OF
PETITION FOR REHEARING

Pursuant to the provisions of Rule 40(a) of the Federal Rules of Appellate Procedure, the Equal Employment Opportunity Commission, appellant in this case respectfully requests that the Court grant its petition for rehearing on the decision issued in this case on October 1, 1968. The grounds upon which the Commission bases its request are as follows:

1. The holding of the Court to the effect that persons seeking relief from alleged acts of discrimination prohibited by Title VII of the Civil Rights Act of

1964 are obliged to seek relief from state agencies other than agencies having general jurisdiction in the area of unlawful employment practices is contrary to, (a) the intent of Congress as shown by the legislative history of Title VII; and, (b) the purposes and policies of Title VII as evidenced by relevant decisions of the Supreme Court and other Courts of Appeals handed down since the argument in this case.

2. Contrary to the holding of the Court the California Industrial Welfare Commission does not have clear jurisdiction over the charging party's claim that she was paid at a rate lower than that paid male employees performing the same work.

I.

The Court's decision is inconsistent with the intent of Congress as evidenced by the legislative history of Title VII, and is contrary to the purposes and policies of the Civil Rights Act of 1964.

- A. The Legislative History of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e - §2000e-15 (1964) Demonstrates that Congress Intended to Limit Requirement of Prior Filing to Those State Commissions Administering Fair Employment Practice Laws Similar to Title VII.

As noted by the Court in its opinion, the requirement

of prior resort to a State or local agency was not part of the original civil rights bill as it passed the House of Representatives. On page 4 of the slip opinion, the Court refers to the remarks of Senator Dirksen at 110 Cong. Rec. 12807, 12814, and 12819 (1964), when the Senator was discussing the amendment to §706(b) incorporating this requirement. In explaining the effect of the amendment to §706(b) and (c), at 110 Cong. Rec. 12819, the Senator made the following comments:

"(b) and (c): These sections providing [in the original House version] for conciliation and court enforcement 90 days after the Commission has determined that voluntary compliance cannot be obtained, and permitting the person aggrieved to bring a civil action in court with the permission of one member of the Commission if the Commission has failed to bring a court action, are substantially modified and are replaced by new subparagraphs (b), (c), (d), and (e) to take into account the many States which have State or local FEP laws.

"New subsection (b) provides that where there is such a State or local law, no charge may be filed with the Commission until 60 days (120 days during the first year after the effective date of a new State or local law) after proceedings have been commenced under the State or local law. If any requirement for the commencement of such proceedings is imposed other than the filing of a written

and signed statement of facts on which the proceeding is based, the 60 days shall begin to run from the time such a statement is sent by registered mail to the appropriate State or local authorities." (emphasis supplied)

The further explanation of the prior resort requirement, quoted by the Court at pp. 4-5 of the slip opinion, if viewed in context makes it clear that the Senator considered the provision requiring prior resort to state agencies only in relation to state FEP legislation similar in scope to the proposed federal statute. During the same speech which contains the language quoted by the Court, Senator Dirksen stated:

"Frankly, at the very outset, in an examination of the entire civil rights package, I started with title VII. I did so because of its far-reaching character, for one thing. Second, a number of States have FEPC laws and have State-enforcing commissions. I thought if there were anything vulnerable in the bill, it would be title VII.

"When it comes to administration, I believe that we have done a reasonably good job on the substitute, hoping in every case that administration might be kept at the local level, because many cases are disposed of in a matter of days, and certainly not more

than a few weeks. In the case of California, FEPC cases are disposed in an average of about 5 days.

In my own State it is approximately 14 days.

"That will be the first point of contact when it comes to enforcement. It will be in the hands of the States. There are now 28 States which have FEPC acts containing enforcement provisions, and there are 3 additional States where enforcement is on a rather voluntary and conciliatory basis." 110 Cong. Rec.

13087 (1964) (emphasis supplied)

Senator Humphrey supplied a similar emphasis on State FEPC laws. For example, the paragraph immediately following that from which the Court quotes at 110 Cong. Rec. 13088 (1964) (See slip opinion, n. 5 at p. 5) reads as follows:

"We have provided that in the first year after enactment of the civil rights statute there will be no enforcement at all. We have provided, for States which do not now have fair employment practice laws, that there will be an additional 180 days before there is any impact of the law." 110 Cong. Rec. 13088 (1964). (emphasis supplied)

Finally, the remarks of Senator Case, as they appear at 110 Cong. Rec. 13081 (1964) and as quoted in footnote 5 of the Court's opinion, are in support of the remarks of Senator Clark immediately preceeding them. Senator Clark makes it crystal clear that the

Congress is referring only to State FEPC laws similar in scope to Title VII:

"The third reason why I say the bill is so important is that legislation is needed at the Federal level to enforce these rights. This contention was documented at great length in my speech of April 8. I pointed out then that it is true that in 28 States and some 48 cities there are fair employment practices laws or ordinances. Every State east of the Mississippi and north of the Ohio, except Maine and New Hampshire, has fair employment practice legislation.

* * *

"West Virginia, Kansas, Oklahoma, Colorado, and New Mexico also have such legislation. The three Pacific Coast States and Idaho and Nevada have fair employment practice legislation.

* * *

"The States which have the best FEPC laws--and I count my own State of Pennsylvania as one; I am proud of our law--are those which most articulately demand and request a Federal law to assist them. Five very able men testified before the Senate Committee on Manpower and Employment. They are the men who administer the fair employment practice

laws in New York, New Jersey, Missouri, Minnesota,
and California. Those five men were unanimous
in their support of fair employment practices legis-
lation at the Federal level.

* * *

"The Governors or the representatives of Governors
of 15 States are also on record as supporting a Federal
FEPC law." 110 Cong.Rec. 13080 (1964) (emphasis supplied.)

Other portions of the legislative history, not referred to
by the Court, are equally persuasive for the proposition that
Congress, in adopting the Leadership Compromise with respect
to state and local laws, was only concerned with possible
jurisdictional conflicts with State FEPC legislation, not State
equal pay legislation. Moreover, a thorough review of "Legis-
lative History of Title VII and XI of Civil Rights Act of 1964",
GPO Catalogue No. Y3,EQ2; 2C49/2, has revealed no legislative
history that explicitly supports the Court's conclusion. Indeed,
prior resort to state or local equal pay laws was not even
mentioned in the debate. This is hardly surprising since the
Federal Equal Pay Act permits a woman to complain to the Federal
authority without first attempting to have her complaint resolved
by a state or local authority. The Congress is unlikely to have
intended to impose a requirement under Title VII when the

Federal statute that deals solely with equal pay has no such requirement. The Court's decision, however, would create this discrepancy between the two Federal statutes.

Prior to the introduction of the Leadership Compromise, Senator Dirksen introduced several amendments, but reversed one dealing with the question of jurisdiction between the State and Federal legislation in the fair employment practices area. A reading of the Senator's comments in this regard demonstrates his exclusive concern with the preservation of State fair employment practice laws, and an absence of concern with State equal pay legislation:

"I am withholding one amendment. It is probably more important than all the others. It deals with the procedure to be followed by an aggrieved person who feels that he has been the victim of discrimination in the employment field. This involves the question of jurisdiction, since 30 States today have enacted and put into practice their own code which deals with employment discrimination.

"The 30 States to which I refer are:

"Alaska and Arizona; California and Colorado; Connecticut and Delaware; Idaho and Illinois; Indiana and Iowa; Kansas and Massachusetts;

Michigan and Minnesota; Missouri and Nebraska;
Nevada and New Jersey; New Mexico and New York;
Ohio and Oregon; Pennsylvania and Rhode Island;
Washington and West Virginia; and Vermont and
Oklahoma." 110 Cong. Rec. 8193 (1964) ^{1/}
(emphasis supplied).

Five states (Arkansas, Georgia, North Dakota, South Dakota and Texas) that have equal pay laws but no general FEP legislation are not included in Senator Dirksen's list of 30 states which have prior jurisdiction under the Senator's amendment.

The relationship between Title VII and State fair employment practice laws which concerned Senator Dirksen was also underscored by Senator Clark quoted above, as follows:

"Mr. President, title VII of the bill has received more study, discussion and debate than any other title in the bill. Title VII of the bill was neither conceived in haste nor written on the basis of speculation. Title VII, which relates to racial discrimination in employment, is based upon the accumulated experience of 25 States which have fair employment practices laws.

1/ Of the 30 States mentioned by Senator Dirksen, a recent review of State law by the Commission's staff indicates that, as late as 1968, 8 or almost 1/3 did not have State Equal Pay laws. This fact, of course, is a (continued)

"The Senator from Pennsylvania [Mr. Clark] was the chairman of the subcommittee that took testimony on the subject of fair employment practices. As I recall, that bill was reported by a hugh majority, and a majority that was arrived at after very careful study. Therefore, whenever Senators have studied the problem of fair employment practices, they have decided in favor of legislation in this area. 110 Cong. Rec. 13082 (1964). (emphasis supplied.)

As the foregoing makes clear, members of Congress consistently referred to Title VII as the FEP section of the Civil Rights Act of 1964, and used the same term when referring the kind of State legislation which required prior filing under §706(b).

1/ (continued)
virtually irrebutable indication that Senator Dirksen, as well as other members of Congress, did not consider equal pay legislation to be included in their references to State fair employment practice (FEP) legislation. The 8 States are: Delaware, Idaho, Iowa, Kansas, Minnesota, Nevada, New Mexico and Vermont.

2/ See, for example, the remarks of Representative Reid of New York during the House debate:

"One of the cornerstones of this bill is the FEPC title." 110 Cong. Rec. 1635 (1964).

B. The doctrine of "substantial relief" as explicated by the Court is contrary to the provisions of Title VII.

The Court's holding that because the California Division of Industrial Welfare had the authority to effect an adjustment of the charging party's wage rate "substantial relief" was available under state process, evidences a serious misconception about the nature of a proceeding under Title VII and the kind of relief available in such proceedings. The Court refused to accord any real weight to the allegations of the charge relating to "upgrading", i.e. promotional opportunity, and titles for female employees, which as shown by Miss Buckley's letter to the Commission bears on the "practices of the Bank toward women in the bank generally" as well as my own problems with it...a check of the bank records would reveal salary discrepancies [between male and female employees] and further reveal that most women who have been promoted were on job for lengthier periods of time than were men who...received similar promotions." (emphasis supplied.) (See slip opinion p. 5 fn. 6). Giving no practical meaning to the fact that the charge plainly alleged a practice of discrimination against females as a class, the Court seems to have held that all that is really involved in a Title VII

3/ See Record page 34.

proceeding is whether the charging party has a grievance. This view of the statute ignores a salient principle of a Title VII proceeding, that Title VII discrimination is class discrimination by its very nature (See, Hall v. Werthan Bag, 251 F.Supp. 184, M.D. Tenn. (1966), and a private charging party has the right to maintain a class action (Oatis v. Crown Zellerbach, __F.2d__, C.A. 5, No. 25307, decided, July 16, 1968), bringing into issue not only his own grievance but the practice of discrimination from which the specific act of discrimination sprang, and obtain relief for all employees who are also subject to the discriminatory practice.

In this respect, as noted in the decision of the Supreme Court in Newman v. Piggie Park, __U.S.__, 88 S.Ct. 964 (1968) and the decision of the Fifth Circuit in Jenkins v. United Gas, supra, proceedings under the Civil Rights Act of 1964 are not litigation in the conventional sense. In a Title VII case the charging party "takes on the mantle of the sovereign." Jenkins, supra, slip opinion p. 8. "And the charge itself is something more than the

4/ Even if the original charge had not specifically articulated the class nature of the complaint that would be of no consequence. See Jenkins v. United Gas, __F.2d__, C.A. 5, No. 24555, decided, Aug. 29, 1968, slip opinion, p. 3, fn. 3; King v. Georgia Power, D.C. N.D., Ga., Civil Action No. 11723, Aug. 13, 1968, 58 LC 6570, 6576.

single claim that a particular job [rate of pay] has been denied him [her]. Rather, it is necessarily a dual one: (1) a specific job, promotion, etc. has actually been denied, and (2) this was due to Title VII forbidden discrimination." Ibid. In light of this special factor present in Title VII the Court pointed out that the size of the specific charging party's own claim is not controlling. It may be "tiny"; nonetheless, it is sufficient "to launch a full scale inquiry into the charged unlawful motivation in employment practices." supra, slip opinion p. 9.^{5/} (A copy of the decision in Jenkins is attached for the convenience of the Court.)

There is no way to square the ruling of the Court in this case with the Supreme Court's decision in Newman v. Piggie Park, supra, and the Fifth Circuit decision in Jenkins, supra, for the decision here rests entirely on the assumption that individual relief which may flow from a proceeding before the California

^{5/} The fact that these issues were presented to the court in a suit filed under Section 706 rather than in a demand proceeding as is the case here, does not alter the principle. The nature of a proceeding before the Commission is no different in terms of the public interest involved than a proceeding before the District Court. This was made plain in King v. Georgia Power, supra.

Industrial Welfare Commission would be "substantial" relief in a Title VII proceeding. And contrary to the view of the Court that general allegations of discrimination contained in the charge are not substantial, they are, in fact, the essence of the proceeding under Title VII.

It is literally impossible to overstate the importance of the principle that a Title VII proceeding is aimed at bringing an end to the practice of discrimination as well as the specific act of discrimination. Thus, as the Jenkins case shows, even if Miss Buckley's wages were adjusted, she would nonetheless be entitled to maintain an action under Title VII. Any other view of the Act compels the Commission and the courts to attack this cancer in our society employee by individual employee--and that just will not work. The contrary view of Title VII articulated by the Court in this case strikes a serious blow at the entire enforcement scheme of the Act--race cases, and those involving religion and national origin as well as sex. The decision will become a weapon in the hands of discriminators, who up to this point had not succeeded in narrowing the range of a Title VII proceeding, and thereby frustrating the carrying out of the public policy against discrimination, to which Congress had assigned the "highest priority." Newman v. Piggie Park, supra.

Moreover, even if wage discrepancies between male and female employees were the sole substantive issue in this case, the nature of the relief called for by the decisions in Newman v. Piggie Park, supra, and Jenkins, supra, is not available under the California law. The Industrial Welfare Commission is not authorized under California law to conduct "full scale inquiry" into alleged discrimination in pay based on sex in processing a single charge, nor does it appear to be empowered to grant relief to all female employees who may have been the victims of such discrimination by the Bank, as may be done under Title VII. (See Jenkins, supra, Oatis, supra, Newman v. Piggie Park, supra.) Thus, even under the standard of "substantial" relief set by the Court in this case, there was no requirement for prior resort to the Industrial Welfare Commission, since that Commission cannot provide "substantial" relief even on the issue of wages within the concept of relief embodied in Title VII.

II. The provisions of the
California Labor Code,
Section 1197.5 may not apply
to attorneys

As the Court found, the Charging Party herein was employed "as an attorney in the Law Division of Appellee, Union Bank" at the time of the alleged unlawful employment practices. The "equal pay" provisions of the California Labor Code are part of comprehensive body of law regulating wages, hours and working conditions for minors and females. The California law provides for administration of this body of law by the Industrial Welfare Commission working through the Division of Industrial Welfare, Department of Industrial Relations. The Commission has the authority to issue orders and has issued a number of such orders, including orders of general application, in connection with its administration of the relevant sections of the California Labor Code. Among such general orders is a list of occupations generally exempt from the coverage of the Code, which may be read to include the "equal pay" provisions of the Code. Woemn employed in executive, administrative or professional capacities defined as females whose work is predominantly

intellectual, managerial or creative, requiring the use of independent judgment earning more than \$450 per month are exempt, as are all females licensed or certified to practice any of the following professions: law, medicine, dentistry, architecture, engineering, teaching or accounting.

(Bureau of National Affairs, State Laws Reporter, SLL 14:302, para. 2.020) Neither the Attorney-General of the State of California, nor the Industrial Welfare Commission has specifically ruled on the question of whether these exceptions apply to the equal pay provisions of the California Labor Code.

In view of the above, the Commission respectfully suggests that the Court may have erroneously concluded that there was, in fact, a state agency where "substantial relief against the alleged discrimination [was] available..." to the Charging Party. Therefore, there may have been no requirement that the Charging Party in this case file a claim with the California Division of Industrial Welfare prior to filing her charge with the Equal Employment Opportunity Commission.

Moreover, even if it turned out that the Commission has misinterpreted the laws of the State of California, we show

below that the Court's decision creates extremely difficult problems for charging parties under Title VII, which will have the undesirable effects of encouraging discriminators to refuse to comply with Title VII and open the doors of the courts to a period of litigation on procedural questions rather than on the merits of these disputes. The decision places two heavy burdens on persons who would file charges with the Commission in an effort to secure their federally guaranteed right to be free from discrimination in employment. First, each charging party would be presumed to have knowledge of each and every local and state law or ordinance which might purport to regulate the dispute, including any exemptions or exclusions from the coverage of the local law. Second, even if each charging party had this information, he would then have to make a judgment concerning the substantiality of the relief available.

The consequences of ignorance of all potentially relevant state or local laws or an error in judgment on the part of the charging party is likely to be fatal to his obtaining his rights under Title VII. Should the charging party elect

to go to the state or local agency when it later turns out that prior resort to such agencies was not required, it is probable that the 90 days allowed under Section 706(d) of Title VII for the filing of charges in such cases (210 days is allowed in cases where prior resort to local agencies is required), a brief period at best, will have expired and the charging party will be barred from filing his complaint with the Commission. Cf. NLRB vs. Silver Bakery of Newton, 351 F.2d 37 (C.A. 1, 1964). On the other hand, should it later be determined, as the Court has in this case, that prior resort to the local agency was required, the 210-day period for the filing of charges allowed in such situations is quite likely to have expired, as it has in this case, and the charging party will be cut off from his federal 6/ rights, as would appear to be in this case.

6/ We do not mean to suggest that there are necessarily many agencies to which charging parties would have to bring their cases prior to filing charges with the EEOC. But some difficult problems can arise. North Dakota, for example, does not have a fair employment practice statute, but does have a labor relations law which prohibits the use of force or intimidation to prevent an employee from performing his work. (North Dakota Rev. Code, Section 34-0104). A Negro, who had been threatened by his supervisor and felt that he was being kept from his work because of his race, would face the question of (con't)

In sum, this decision places upon the charging party the duty to have a knowledge of state and local law not common among practicing attorneys. This result, the Commission respectfully suggests, is contrary to the purposes of Title VII. As the Fifth Circuit Court of Appeals has said recently in Jenkins v. United Gas Corp., supra, "...it is in keeping with the purposes of the Act to keep the procedures for initiating action simple."

6/ (continued)

whether he must first try to obtain relief under Dakota's labor law. Similarly, Section 47-2101 et seq. District of Columbia's Code, regulates the activities of employment agencies in the District. Section 703(b) of Title VII also regulates employment agencies. Should a Negro, believing he was denied referral because of his race, wished to file a charge against the employment agency, the decision of this Court places the prospective charging party in the position of having to decide whether to go first to the EEOC or to the District of Columbia Department of Licenses. The instant case itself also shows the difficulties confronted by charging parties under the decision in this case, for as we have seen, it is far from clear whether the California "equal pay" provisions cover the Charging Party herein. In the meantime, the alleged discriminator can argue the question either way.

A large number of charges that the Commission receives are filed by people unschooled in the technicalities of the law, and Title VII should not be administered by the Commission, or interpreted by the courts, to place obstacles in the paths of people who want to assert their rights. A person "should not have to take by-roads through the woods and follow winding trails through sharp thickets, in constant tension because of pitfalls and traps..." See Meredith v. Fair, 298 F.2d 696, 703 (C.A. 5, 1962).

Here, however, it seems that not only has the Commission been refused access to certain evidence relevant to a charge of unlawful discrimination, but, more importantly, the charging party appears to have been deprived of her rights to bring an action in the District Court. This result flows from the fact that the Court's holding that the charge in this case was not valid necessarily precludes not only the processing of the case by the Commission but also would appear to preclude a suit filed under Section 706(e). See Mickle v. Exide Battery. How many other persons in the State of California and throughout the country may be similarly deprived of the Federally guaranteed rights to obtain aid from the Commission and if that fails to bring suit is as yet unknown.

CONCLUSION

For all the reasons set forth above it is resepctfully requested that the Court grant the Commission's motion for rehearing, and such other relief as the Court may deem just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Motion to Extend
Number of Pages, Motion for Rehearing and Brief in Support
of Motion for Rehearing and for Oral Argument have this day
been served by airmail, special delivery, certified, postage
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Equal Employment Opportunity
Commission
Washington, D. C. 20506

This 12th day of October 1968.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24555

THOMAS L. JENKINS,

Appellant,

versus

UNITED GAS CORPORATION

and ALLAN B. CALDWELL,

Appellees.

*Appeal from the United States District Court for the
Eastern District of Texas*

(August 29, 1968)

Before BROWN, Chief Judge, BELL and
THORNBERRY, Circuit Judges.

BROWN, Chief Judge: This case is another of those
now frequently coming to us' under Title VII of the

¹*Overnite Transportation Co. v. Equal Employment Opportunity Commission*, 5 Cir., 1968, ____ F.2d ____ [No. 25521, July 5, 1968]; *Oatis v. Crown Zellerbach Corp.*, 5 Cir., 1968, ____ F.2d ____ [No. 25307, July 16, 1968].

Pending but yet undetermined before another panel are:
No. 24789, *Hylar v. Reynolds Metal Co.*; No. 24810, *Dent &*

1964 Civil Rights Act, 42 U.S.C.A. §2000e, forbidding discrimination in employment by reason of race, color, religion, sex, or national origin. At issue is the question whether the offer and acceptance of a promotion, subsequent to the filing of a class action alleging systematic racial discrimination renders the suit moot as to the employee individually or to the class he represents. We hold that the action is not moot on either score and therefore reverse and remand for a full hearing.

The problem arises from the unique structure of Title VII which limits access to the courts by conditioning the filing of suit upon a previous administrative charge with the EEOC² whose function is to effectuate the Act's policy of voluntary conference, persuasion and conciliation as the principal tools of enforcement. The key to the courthouse door being the administrative charge, the door slams shut, the employer argued successfully below, when the specific job assignment claimed to have been denied the employee because of the employer's racial discrimination was offered to and accepted by the employee.

The Employee, Jenkins, is a Negro and was working for the Employer, United Gas Corporation, as a "serviceman's helper" at the time this action was com-

Equal Employment Opportunity Comm. v. St. Louis-San Francisco Ry.; No. 24811, *Muldrow v. H. K. Porter Co.*; No. 24812, *Pearson v. Alabama By-Products Corp.*; No. 24813, *Pettway & Equal Employment Opportunity Comm. v. American Cast Iron Pipe Co.*

²Equal Employment Opportunity Commission.

But in keeping with the Act's short timetable EEOC gave notice (§706 (e); 42 U.S.C.A. §2000e-5 (e)) that due to heavy workload, efforts at conciliation had not been undertaken and Employee was notified of his right (§§706 (e), (f); 42 U.S.C.A. §§2000e-5 (e), (f)) to file suit in Federal District Court.

Employee, within the 30 days allowed, filed a class action alleging systematic racial discrimination which, tested against the applicable standard⁴ of how a complaint is to be read under F.R.Civ.P. 12 (b) (6), was a model of specificity in plant-wide, system-wide racial discrimination which took its toll of Employee and his group principally in denial of promotion to the position of Serviceman.⁵ The prayer was equally specific

race (Negro) in that Caucasians have been transferred into the Service Department and promoted to Servicemen, while he and other Negroes remained Helpers, although qualified to be Servicemen.

SUMMARY OF INVESTIGATION

The investigation substantiates the Charging Party's allegation:

[Here follows factual detail]

DECISION

Reasonable cause exists to believe that the charge is true in that Respondent is discriminatorily refusing to promote the Charging Party and other qualified Negroes to the position of Serviceman."

⁴See, *Barber v. Motor Vessel "Blue Cat"*, 5 Cir., 1967, 372 F.2d 626, 627-28, 1967 A.M.C. 2337, ———; *Conley v. Gibson*, 1957, 355 U.S. 41, 45-48, 78 S.Ct. 99, ——— - ———, 2 L.Ed.2d 80, 86-88.

⁵The complaint alleged:

"And plaintiff says that the defendants, and each of them, are denying him equality of opportunity in employment because of his race, in violation of Title VII of the Civil Rights Act of 1964 * * *.

B. Plaintiff further alleges, * * * that no Negroes are employed as Servicemen at any of the plants, of-

and broad, seeking an injunction on behalf of Employee and his class, not only as to promotion to Servicemen but generally prohibiting Employer "from continuing or maintaining the policy, practice, custom and usage of denying, abridging, withholding, conditioning, limiting or otherwise interfering with the rights of plaintiff and others similarly situated to enjoy equal employment opportunity as secured by Title VII of the Act * * * without discrimination on the basis of race or color." It then ended with a prayer for back pay differential, and as a valuable unique adjunct of the Act (§706(k); 42 U.S.C.A. §2000e-5(k)) the allowance of attorney's fees.

But within a few weeks Employer offered the coveted promotion to Serviceman, which Employee ac-

fices or service centers under the direct supervision and control of the defendant corporation, even though there are Negroes other than plaintiff who are qualified to hold such positions. And, in the alternative, plaintiff alleges that if there are other Negroes employed in such capacity by the defendant corporation, that such employment is on a token basis only; and plaintiff alleges that the defendant corporation is wilfully and intentionally denying to him, and other Negro employees similarly situated, equal employment opportunity in violation of Title VII of the Civil Rights Act of 1964.

C. Plaintiff was refused the promotion to Serviceman, * * * on the basis of his race and color pursuant to the defendant corporation's long standing and well-known practice, custom, and usage of refusing to promote Negroes to such positions because of their racial origin and classification. Pursuant to this policy practice, custom and usage, Negroes other than plaintiff have been denied promotion to such positions on the basis of race and color."

cepted one week later. Shortly, Employer moved to dismiss the action as moot since Employee was tendered and accepted promotion to Serviceman. Although the moving papers warranted the Judge to conclude that there was no dispute about the offer and acceptance of this individual promotion, the court without more — and without ever making any factual inquiry⁶ into the broad charges affecting others system-wide — entered an outright judgment of dismissal.⁷

Neither on the score of the action in Employee's own right or his representation of those in his class will this outcome jell. Like considerations bear on each claim and they start with the unusual structure of Title VII. Of course the legislative compromise changed the concept from an enforcing-adjudicatory administrative agency to one in which the agency would conciliate, leaving the ultimate, final sanction to be judicial enforcement. As a part of the scheme such judicial enforcement was to be initiated by and

⁶In fact, he excused Employer from answering interrogatories and refused to grant other motions of the Employee in his pre-trial effort to ascertain the facts.

⁷Although the memorandum opinion referred to in the formal judgment spoke in terms of mootness, the judgment has all the earmarks of a binding adverse determination on the merits. It reads:

"ORDERED, ADJUDGED, and DECREED by the Court that the above entitled and numbered cause be and the same is hereby dismissed at the cost of the Plaintiff."

Ironically, Employer on the ground that it was an F.R.Civ. P. 23 (b) (2) claim, not a 23 (b) (3) type, might even assert it as res judicata as to all members of the class. See F.R.Civ.P. 23 (c)(3).

at the hands of individual working grievants.⁵

⁵For an excellent, well organized compilation of materials with helpful commentary that portrays legislative history in its technical sense and equally in the historian's broader view of men, times, places and action, see BNA, *The Civil Rights Act of 1964* (1964). The significant differences between the House Bill and that of the Senate (which was enacted) are set out, appendix C-1 at 289, 292-95, Dirksen explanation; C-2 at 297, 300-04, Humphrey explanation; and C-3 at 305, 311-16, comparative analysis by Congressman McCulloch. The commentary traces the largely unsuccessful efforts to eliminate such discrimination through Presidential Commissions and Executive Orders, the long legislative efforts over the years (at 9-22), and in chapter 6 discusses the evolvement of the Act's provisions for administration and enforcement (at 41-56) and summarizes those pertinent here along these lines. Section 706 (42 U.S.C.A. §2000e-5) provides that within 90 days of occurrence a written charge may be filed with EEOC either by a person claiming to be aggrieved, or by a member of EEOC who has reasonable cause to believe that an employer has engaged in an unlawful employment practice. EEOC then notifies the employer of the charge and conducts an investigation. Under §§709(a), 710(a), (42 U.S.C.A. §§2000e-8(a),-9(a)) EEOC in the investigation of such charges has the power to examine witnesses under oath and to require the production of evidence. If EEOC determines that there is reasonable cause to believe that the charge is true, it is then authorized to attempt to eliminate the practice by informal conference, conciliation, and persuasion. If EEOC is unable to secure voluntary compliance it then notifies the person aggrieved and a civil action may then be filed by the person claiming to be aggrieved, or if the charge was brought by a member of EEOC then by any person whom that charge alleges was aggrieved. In the employee's suit the court may appoint an attorney for the complainant and may authorize the prosecution of the suit without the payment of fees, costs, or security.

Except for the pattern or practice situation, (§707(a), 42 U.S.C.A. §2000e-6(a)), in which the Attorney General may institute suit and intervention by him by leave of the court on the Attorney General's certification that the case is of general public importance (either on his own or in response to recommendation of EEOC, (§705(g) (6), 42 U.S.C.A. §2000e-4(f) (6))), the suit is between private parties.

Although there are restrictions both in time and preconditions for court action this does not minimize the role of ostensibly private litigation in effectuating the congressional policies. To the contrary, this magnifies its importance while at the same time utilizing the powerful catalyst of conciliation through EEOC. The suit is therefore more than a private claim by the employee seeking the particular job which is at the bottom of the charge of unlawful discrimination filed with EEOC. When conciliation has failed — either outright or by reason of the expiration of the statutory timetable — that individual, often obscure, takes on the mantle of the sovereign. *Newman v. Piggie Park Enterprises*, 1968, ____ U.S. ____, 88 S.Ct. ____, 19 L.Ed.2d 1263; *Oatis v. Crown Zellerbach*, *supra*. And the charge itself is something more than the single claim that a particular job has been denied him. Rather it is necessarily a dual one: (1) a specific job, promotion, etc. has actually been denied, and (2) this was due to Title VII forbidden discrimination.

Considering that in this immediate field of labor relations what is small in principal is often large in principle,⁹ element (2) has extreme importance with

⁹In *United States Gypsum Co. v. United Steelworkers of America*, 5 Cir., 1967, 384 F.2d 38, 45-46, *cert. denied*, 1968, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ [36 U.S.L.W. 3287, U.S. Jan. 15, 1968], we had this to say:

"Nationwide activity can grind to a halt over the question of who is to throw a switch. Problems which to the outsider seem petty are thought by the adversaries to be matters of great principle, if not principal."

See *Atlanta Terminal Company & Southern Ry. Co. v. System Federation No. 21, Railway Employees' Dep't., AFL-CIO*, 5 Cir., 1968, ____ F.2d ____ [No. 25354, June 25, 1968] affirming a

heavy overtones of public interest. Whether in name or not, the suit is perforce a sort of class action for fellow employees similarly situated. Consequently, while we do not here hold that such a "private Attorney General"¹⁰ is powerless absent court approval to dismiss his suit, see F.R.Civ.P. 41 (a) (2); the court, over the suitor's protest, may not do it for him without ever judicially resolving by appropriate means (summary judgment, trial, etc.) the controverted issue of employer unlawful discrimination.

In dollars Employee's claim for past due wages may be tiny. But before a Court as to which there is no jurisdictional minimum, (§706(f), 42 U.S.C.A. §2000e-5(f)), it is enough on which to launch a full scale inquiry into the charged unlawful motivation in employment practices. It is even more so considering the prayer for injunction as a protection against a repetition of such conduct in the future.

With so much riding on the claim of the private suitor, the possibility that in this David-Goliath confrontation economic pressures will be at work toward acceptance of preferred post-suit jobs and the equal possibility that an employer would devise such a re-

District Court award of \$12,000 in attorney fees on a recovery of \$2,286.54 in damages. See also *Local No. 92, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO v. Norris*, 5 Cir., 1967, 383 F.2d 735.

¹⁰"If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority." *Newman v. Piggie Park, supra*, — U.S. at —, 88 S.Ct. at —, 19 L.Ed.2d at 1265.

sist-and-withdraw tactic as a means of continuing its former ways calls for the trial court to keep consciously aware of time-tested principles particularly in the area of public law. Such actions in the face of litigation are equivocal in purpose, motive and permanence.¹¹

The dismissal fares no better as to the class action. The Trial Judge's principal thesis on this score was "that no common question of fact exists as to all Negro employees of the defendant, since different circum-

¹¹"The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. * * * To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations. * * * [V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States v. W. T. Grant Co.*, 1953, 345 U.S. 629, 632-33, 73 S.Ct. 894, —, 97 L.Ed. 1303, 1309-10 (Emphasis added.) (Footnotes omitted.); see *Gray v. Sanders*, 1963, 372 U.S. 368, 375-76, 83 S.Ct. 801, —, 9 L.Ed.2d 821, 827.

And see *Cypress v. Newport News General & Nonsectarian Hosp. Ass'n.*, 4 Cir., 1967, 375 F.2d 648, 658 (en banc): "Such a last minute change of heart is suspect to say the least. We recently had occasion to observe in *Lankford v. Gelston*, 364 F.2d 197, 203 (4 Cir., 1966), under somewhat different circumstances, that 'protestations of repentance and reform timed to anticipate or to blunt the force of a lawsuit offer insufficient assurance' that the practice sought to be enjoined will not be repeated." And in a different context we phrased it this way. "What has been adopted can be repealed, and what has been repealed can be readopted. We conclude, therefore, that the plaintiffs are entitled to have their injunction against state action depriving them of their constitutional rights based on the record at the time the case was tried." *Anderson v. City of Albany*, 5 Cir., 1963, 321 F.2d 649, 657. See *Bailey v. Patterson*, 5 Cir., 1963, 323 F.2d 201, cert. denied, 1964, 376 U.S. 910, — S.Ct. —, — L.Ed.2d —.

stances surround their different jobs and qualifications in the structure of the corporation."¹² To that Employer adds several more we find equally wanting. One is that there was no class since the other Negro apparently referred to in the administrative charge who was eligible for, but denied promotion to, Serviceman had likewise been promoted. There are at least two answers to that. First, this ignores element (2) of the claim—plant-wide system-wide racially discriminatory employment practices. Second, for the reasons pointed out at length Employee's personal claim is yet very much alive as to (a) back pay differential and (b) injunction protection against future repetition. The other supports urged by Employer are all wrapped up in its championing of *Mondy v. Crown Zellerbach Corp.*, E.D. La., 1967, 271 F.Supp. 258, which now falls before *Oatis v. Crown Zellerbach*, 5 Cir., 1968, ____ F.2d ____ [No. 25307, July 16, 1968].

To *Oatis* we need only add a few comments. The holding that the nature of the claims asserted make it a 23 (b) (2)¹³ class action was expressly recognized

¹²*Jenkins v. United Gas Corp.*, E.D. Tex., 1966, 261 F.Supp. 262, 263-64.

¹³F.R.Civ.P. 23:

"(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: * * *

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole * * *."

in the Advisory Committee's Note.¹⁴ And the Note's emphasis on declaratory, injunctive relief is easily satisfied by Title VII. See §706 (g), 42 U.S.C.A. §2000e-5 (g).

Indeed, if class-wide relief were not afforded expressly in any injunction or declaratory order issued in Employee's behalf, the result would be the incongruous one of the Court — a Federal Court, no less —

¹⁴"Subdivision (b) (2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

"Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See *Potts v. Flax*, 313 F.2d 284 (5th Cir., 1963); *Bailey v. Patterson*, 323 F.2d 201 (5th Cir. 1963), cert. denied, 377 U.S. 972 (1964); *Brunson v. Board of Trustees of School District No. 1, Clarendon Cty., S. C.*, 311 F.2d 107 (4th Cir. 1962), cert. denied 373 U.S. 933 (1963); *Green v. School Bd. of Roanoke, Va.*, 304 F.2d 118 (4th Cir. 1962); *Orleans Parish School Bd. v. Bush*, 242 F.2d 156 (5th Cir. 1957), cert. denied, 354 U.S. 921 (1957); *Mannings v. Board of Public Inst. of Hillsborough County, Fla.*, 277 F.2d 370 (5th Cir. 1960); *Northcross v. Board of Ed. of City of Memphis*, 302 F.2d 818 (6th Cir. 1962), cert. denied, 370 U.S. 944 (1962); *Frasier v. Board of Trustees of Univ. of N.C.*, 134 F. Supp. 589 (M.D.N.C. 1955, 3-judge Court), aff'd, 350 U.S. 979 (1956). Subdivision (b) (2) is not limited to civil-rights cases * * * ." 39 F.R.D. 102 (1966).

itself being the instrument of racial discrimination, which brings to mind our rejection of like arguments and result in *Potts v. Flax*, 5 Cir., 1963, 313 F.2d 284, 289.¹⁵

¹⁵In analyzing why there could be a solo representation in a school desegregation case we had this to say:

"Fifth, and perhaps most important, the relief to the class as it was sought and obtained was a good deal more than something merely appropriate. There is at least considerable doubt that relief confined to individual specified Negro children either could be granted or, if granted, could be so limited in its operative effect. By the very nature of the controversy, the attack is on the unconstitutional practice of racial discrimination. Once that is found to exist, the Court must order that it be discontinued. Such a decree, of course, might name the successful plaintiff as the party not to be discriminated against. But that decree may not—either expressly or impliedly—affirmatively authorize continued discrimination by reason of race against others. Cf. *Shelley v. Kraemer*, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161. Moreover, to require a school system to admit the specific successful plaintiff Negro child while others, having no such protection, were required to attend schools in a racially segregated system, would be for the court to contribute actively to the class discrimination proscribed by *Bush v. Orleans Parish School Board*, 5 Cir., 1962, 308 F.2d 491, 499, on rehearing 308 F.2d 503; see also *Ross v. Dyer*, 5 Cir., 1962, 312 F.2d 191."

In note 5, at 289 we pointed out:

"Additionally, as we have recently pointed out, a school segregation suit presents more than a claim of invidious discrimination to individuals by reason of a universal policy of segregation. It involves a discrimination against a class as a class, and this is assuredly appropriate for class relief. *Bush v. Orleans Parish School Board*, 5 Cir., 1962, 308 F.2d 491, 499, modified on rehearing, 308 F.2d 503. See also *Ross v. Dyer*, 5 Cir., 1962, 312 F.2d 191."

See also *Hall v. Werthan Bag Corporation*, M. D. Tenn., 1966, 251 F.Supp. 184, 186:

"If it exists, it applies throughout the class. * * * And

Any effort to distinguish *Oatis* as Employer's brief undertook to do respecting *Hall v. Werthan Bag Corp.*, *supra*, on the ground that interventions were involved is unavailing. Amended Rules 19, 23, and 24 are meant to, and do, dovetail in many respects. *Atlantis Development Corp v. United States*, 5 Cir., 1967, 379 F.2d 818, 824-25. Meeting the test of the right to intervene, F.R.Civ.P. 24, intervention is actually superfluous if — and here there is no if, big or little — element (4) of 23 (a) on the adequacy of the representation of the class is satisfied.

The reason given by the Trial Court (see text at note 12, *supra*) requires only slight, if any, further answer. Basically it misconceives the purpose of the lawsuit. The Federal Judge — awesome as are his responsibilities and powers when invoked by a timely, proper (§§ 706 (e), (f) 42 U.S.C.A. §2000e-5 (e), (f)) suit — does not sit as a sort of high level industrial arbiter to determine whether employee X rather than Y should have a promotion. Relative competency and qualification, are involved, to be sure. But they are relevant in determining whether denial of the coveted promotion was motivated by unlawful discrimination of race, color, sex or national origin. This is the familiar problem in §8 (a) (3), 29 U.S.C.A. § 158 (a) (3) discharges in NLRB cases and, closer home, voter registration cases in which, of course, the class-action-sought-for voting right is the most highly personalized, individualized thing imaginable.

whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class."

And finally, as *Oatis* makes clear in its reference to sub-classes, the Court under F.R.Civ.P. 23 has the duty, and ample powers, both in the conduct of the trial and relief granted to treat common things in common and to distinguish the distinguishable.

REVERSED AND REMANDED.

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 25307

JOHN MARTIN OATIS, DAVID JOHNSON, SR.,
and R. T. YOUNG,

Appellants,

versus

CROWN ZELLERBACH CORPORATION, ET AL,
Appellees.

*Appeal from the United States District Court for the
Eastern District of Louisiana*

(July 16, 1968)

Before BELL, AINSWORTH, and GODBOLD,
Circuit Judges.

BELL, Circuit Judge: This appeal presents the issue whether membership in a class action brought under § 706(e) of the Civil Rights Act of 1964, 24 USCA, § 2000e-5(e), is restricted to individuals who have filed charges with the Equal Employment Opportunity Commission. The District Court answered in the affirmative. *Mondy v. Crown Zellerbach Corporation*, E.D. La.,

1967, 271 F.Supp. 258, 264-66. Being of the view that the class was unduly restricted, we reverse.

The suit giving rise to this issue was instituted on March 1, 1967 by four Negro employees (Hill, Oatis, Johnson and Young) of Crown Zellerbach Corporation. The suit was filed against the company and the two local unions representing employees at the Bogalusa, Louisiana plant of the company. Each plaintiff sued on behalf of himself and all present and prospective Negro employees of the plant, as a class, seeking injunctive relief against unfair employment practices as defined by Title VII of the Civil Rights Act of 1964, 42 USCA, §§ 2000e-2 and 3.

Prior to this action Hill filed a formal charge against the defendants with the Equal Employment Opportunity Commission (EEOC) in the manner provided for under § 706(a) of the Act, 42 USCA, § 2000e-5(a). The Commission informed Hill by letter that it had been unable to obtain voluntary compliance from appellees within the 60 days required by the Act. The suit was commenced two weeks later.

Crown and the unions filed motions to dismiss. They contended that an action under Title VII of the Act, 42 USCA, § 2000e et seq., cannot be brought on behalf of a class, and that in any event plaintiffs Oatis, Johnson and Young could not join in the action as co-plaintiffs inasmuch as they had not filed a charge with the EEOC. The Attorney General, representing the EEOC, was permitted to intervene. See § 706(e) of the Act, *supra*.

The District Court ruled that the action could be maintained as a class action, but that the class was limited to those Negro employees who had filed charges with EEOC pursuant to § 706 (a) of the Act. 271 F.Supp, supra, at pp. 264-66. Oatis, Johnson and Young had not filed such a charge and the motions to dismiss were granted as to them. It is from this dismissal that they appeal.¹

Under the enforcement provisions of Title VII an aggrieved person is required to file a written charge with the EEOC. § 706(a), supra. Assuming the EEOC finds reasonable cause to believe the charge is true, informal efforts to settle with the employer or union are to be made through conference, conciliation, and persuasion.² The filing of such a charge is a condition

¹The express determination and direction required by Rule 54(b) F.R.Civ.P., in connection with the entry of judgment has been made and appeal is proper although the case is still pending as to Hill's complaint. See *Dore v. Link Belt Company*, 5 Cir., 1968, 391 F.2d 671.

²§ 706(a):

Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred . . . that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization . . . with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. . . .

precedent to seeking judicial relief. See § 706(e).³ It is thus clear that there is great emphasis in Title VII on private settlement and the elimination of unfair practices without litigation.

The plaintiffs-appellants maintain that a class action will lie if at least one aggrieved person has filed a charge with the EEOC. Defendants, on the other hand, assert that the administrative, private remedy intent and purposes of the statute will be circumvented and avoided if only one person may follow the administrative route dictate of the Act and then sue on behalf of the other employees. This, they urge, would result in the courts displacing the EEOC role in fostering the purposes of the Act. Defendants also argue that the Act provides for protection of the rights of a class in that § 707(a), 42 USCA, § 2000e-6, envisions a suit by the Attorney General when he finds that a pattern or practice of discrimination exists. This provision, they say, militates against the position of plaintiffs.

The arguments of defendants are not persuasive for several reasons. A similar argument regarding a suit by the Attorney General was rejected by this court

³§ 706(e):

If within thirty days after a charge is filed with the Commission . . . the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. . . .

in a case brought under Title II of the Civil Rights Act of 1964. *Lance v. Plummer*, 5 Cir., 1965, 353 F.2d 585. We again reject it. The Act permits private suits and in nowise precludes the class action device.

Moreover, it does not appear that to allow a class action, within proper confines, would in any way frustrate the purpose of the Act that the settlement of grievances be first attempted through the office of the EEOC. It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC. If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume the next one would be successful. The better approach would appear to be that once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated and we proceed to an examination of this view.

Plaintiff Hill raised several claims in the charge which he filed with the EEOC. One of these was that he was being discriminated against by the use of segregated locker rooms. Under the District Court's ruling Hill might bring suit and be placed in the white locker room. Other Negroes would have to wait until they could process their charges through EEOC before they could obtain the same relief from the same employer. We do not believe that Congress intended such a result from the application of Title VII. The class should not be so narrowly restricted. This conclusion is in line with several District Court decisions. See, for

example, *Hall v. Werthan Bag Co.*, M. D. Tenn., 251 F. Supp. 184; *Bowe v. Colgate Palmolive Co.*, S.D. Ind., 1967, 272 F.Supp. 332; *Moody v. Albemarle Paper Co.*, E.D. N.C., 1967, 271 F.Supp. 27, as those cases involve injunctive relief.

The Supreme Court recently made an apt comment on the nature of suits brought under the Civil Rights Act of 1964. See *Newman v. Piggie Park Enterprises*, 1968, _____ U.S. _____, 88 S.Ct. _____, 19 L.Ed.2d 1263, where the court stated:

“A Title II suit is thus private in form only. When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone, but also as a ‘private attorney general’, vindicating a policy that Congress considered of the highest priority.”

Clearly the same logic applies to Title VII of the Act. Racial discrimination is by definition class discrimination, and to require a multiplicity of separate, identical charges before the EEOC, filed against the same employer, as a prerequisite to relief through resort to the court would tend to frustrate our system of justice and order.

We thus hold that a class action is permissible under Title VII of the Civil Rights Act of 1964 within the following limits. First, the class action must, as it does here, meet the requirements of Rule 23(a) and (b)

(2).⁵ Next, the issues that may be raised by plaintiff in such a class action are those issues that he has standing to raise (i.e., the issues as to which he is aggrieved, see § 706(a), *supra*), and that he has raised in the charge filed with the EEOC pursuant to § 706(a). Here then the issues that may be considered in the suit are those properly asserted by Hill in the EEOC charge and as are reasserted in the complaint.

Additionally, it is not necessary that members of the class bring a charge with the EEOC as a prerequisite to joining as co-plaintiffs in the litigation. It is sufficient that they are in a class and assert the same or some of the issues. This emphasizes the reason for Oatis, Johnson and Young to appear as co-plaintiffs. They were each employed in a separate department of the plant. They were representative of their respective departments, as Hill was of his, in the

5Rule 23, F.R.Civ.P.:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the case as a whole;

class action. They, as co-plaintiffs, must proceed, however, within the peripnery of the issues which Hill could assert. Under Rule 23(a) they would be representatives of the class consisting of the Negro employees in their departments so as to fairly and adequately protect their interests. This follows from the fact that due to the inapplicability of some of the issues to all members of the class, the proceeding might be facilitated by the use of subclasses. In such event one or more of the co-plaintiffs might represent a subclass. It was error, therefore, to dismiss appellants. They should have been permitted to remain in the case as plaintiffs but with their participation limited to the issues asserted by Hill.

REVERSED and REMANDED for further proceedings not inconsistent herewith.

NO. 22220

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUN 24 1968

FRANCIS ALFRED KING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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FILED

JUN 21 1968

WM. B. LUCK, CLERK

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TOPICAL INDEX

	<u>Page</u>
Table of Authorities	iii
I JURISDICTION	1
II STATUTES INVOLVED	2
III STATEMENT OF FACTS	4
IV SPECIFICATION OF ERRORS	5
V ARGUMENT	6
A. THAT THE TRIAL JUDGE HAD PREVIOUSLY ACCEPTED APPELLANT'S PLEA AND HAD IMPOSED SENTENCE DID NOT OF ITSELF PRECLUDE HIM FROM REVIEWING APPELLANT'S MOTION.	6
B. THE TRIAL JUDGE DID NOT ERR IN RULING THAT APPELLANT'S AFFIDAVIT OF BIAS WAS LEGALLY INSUFFICIENT TO SHOW BIAS OR PREJUDICE.	8
1. APPELLANT'S FILING OF THE AFFIDAVIT OF BIAS DID NOT PRECLUDE THE TRIAL JUDGE FROM RULING ON THE LEGAL SUFFICIENCY OF THE AFFIDAVIT.	8
2. APPELLANT'S AFFIDAVIT OF BIAS WAS LEGALLY INSUFFICIENT TO SHOW THAT THE TRIAL JUDGE WAS BIASED OR PREJUDICED.	8
C. THE TRIAL JUDGE DID NOT ERR IN DENYING APPELLANT'S MOTION WITHOUT A HEARING.	11
1. THE REPORTER'S TRANSCRIPT CONCLUSIVELY SHOWS THAT APPELLANT'S PLEA OF GUILTY WAS NOT COERCED BY THE TRIAL JUDGE.	12

	<u>Page</u>
2. THE REPORTER'S TRANSCRIPT CONCLUSIVELY SHOWS THAT APPELLANT WAS REPRESENTED BY COMPETENT COUNSEL OF HIS OWN CHOICE.	14
3. THE REPORTER'S TRANSCRIPT CONCLUSIVELY SHOWS THAT APPELLANT'S PLEA OF GUILTY WAS KNOWINGLY AND VOLUN- TARILY MADE.	17
4. THE REPORTER'S TRANSCRIPT CONCLUSIVELY SHOWS THAT APPELLANT DID NOT RECEIVE AN EXCESSIVE OR ILLEGAL SENTENCE.	19
CONCLUSION	21
CERTIFICATE	22

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Battaglia v. United States, 390 F. 2d 256 (9 Cir. 1968)	7
Behr v. Mine Safety Appliance Company, 233 F. 2d 371 (3 Cir. 1956), cert. denied 352 U.S. 942 (1956), rehearing denied 352 U.S. 976 (1957)	8, 11
Berger v. United States, 255 U.S. 22 (1921)	11
Burgett v. United States, 237 F. 2d 247 (8 Cir. 1956), cert. denied 352 U.S. 1031 (1957)	18
Carvell v. United States, 173 F. 2d 348 (4 Cir. 1949)	6
Cole v. Loew's, Inc., 76 F. Supp. 872 (D. C. S. D. Cal. 1948), rev'd on other grounds 185 F. 2d 641 (9 Cir. 1950)	10, 20
Dillon v. United States, 307 F. 2d 445 (9 Cir. 1962)	7
Eisler v. United States, 170 F. 2d 273 (D. C. Cir. 1948), cert. dismissed 338 U.S. 883 (1949)	11
Euziera v. United States, 249 F. 2d 293 (10 Cir. 1957)	13
Fieldcrest Dairies, Inc. v. City of Chicago, 27 F. Supp. 258 (D. C. N. D. Ill. 1939)	11
Grimes v. United States, ____ F. 2d ____ (9 Cir. June 6, 1968, No. 21659)	11
Halliday v. United States, 380 F. 2d 270 (1 Cir. 1967)	7
Inland Freight Lines v. United States, 202 F. 2d 169 (10 Cir. 1953)	11
Jones v. United States, 323 F. 2d 864 (10 Cir. 1963)	19

Lyons v. United States, 325 F.2d 370 (9 Cir. 1963), cert. denied 377 U.S. 969 (1964)	14
Machibroda v. United States, 368 U.S. 487 (1961)	12
Mirra v. United States, 255 F.Supp. 570 (D.C. S.D. N.Y. 1966), aff'd 379 F.2d 782 (2 Cir. 1967)	12
Overman v. United States, 281 F.2d 497 (6 Cir. 1960), cert. denied 368 U.S. 993 (1962)	19
Price v. Johnson, 125 F.2d 806 (9 Cir. 1942), cert. denied 316 U.S. 677 (1942), rehearing denied 316 U.S. 712 (1942)	8
Rivera v. United States, 318 F.2d 606 (9 Cir. 1963)	14
Scherk v. United States, 242 F.Supp. 445 (D.C. N.D. Cal. 1965), aff'd 354 F.2d 239 (9 Cir. 1965), cert. denied 382 U.S. 882 (1965)	14, 15
Swepston v. United States, 289 F.2d 166 (8 Cir. 1961), cert. denied 369 U.S. 812 (1962)	12
Taylor v. United States, 179 F.2d 640 (9 Cir. 1950)	8
United States v. Bell, 351 F.2d 868 (6 Cir. 1965), cert. denied 383 U.S. 947 (1966)	8
United States v. Hill, 319 F.2d 653 (6 Cir. 1963)	12
United States v. Page, 229 F.2d 91 (2 Cir. 1956)	20
United States v. Pendergrast, 34 F.Supp. 269 (D.C. W.D. Mo. 1940)	11

	<u>Page</u>
United States v. Schmidt, 376 F.2d 751 (4 Cir. 1967)	13
United States v. Smith, 337 F.2d 49 (4 Cir. 1964), cert. denied 381 U.S. 916 (1965)	6
United States v. Tateo, 214 F.Supp. 560 (D.C. S.D. N.Y. 1963)	13
Verdon v. United States, 296 F.2d 549 (8 Cir. 1961), cert. denied 370 U.S. 945 (1961)	20
Wilkes v. United States, 80 F.2d 285 (9 Cir. 1935)	11

Statutes

Title 18, United States Code, §2113	19
Title 18, United States Code, §2113(a)	1
Title 18, United States Code, §2113(d)	1
Title 28, United States Code, §144	4, 9
Title 28, United States Code, §1291	2
Title 28, United States Code, §2255	2, 6, 7, 10, 12

NO. 22220
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCIS ALFRED KING,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF

I

JURISDICTION

On March 29, 1965, appellant entered pleas of guilty to two counts of a nine-count criminal indictment charging appellant and a codefendant, Joe Villarreal, with nine 1/ separate violations of Title 18, United States Code, Sections 2113(a) and (d). On April 26, 1965, the Honorable Charles H. Carr, United States District Judge for the Southern District of California, Central Division, sentenced appellant to imprisonment for a period of 30 years.

On April 4, 1967, appellant filed a motion to vacate his

1/ Mr. Villarreal was charged in eight of the counts.

sentence, pursuant to Title 28, United States Code, Section 2255. Appellant alleged that his pleas of guilty were involuntary in that they were coerced by the trial judge and by other Government agents [C. T. 2]. ^{2/} Appellant also alleged that he had been denied a fair trial in that the trial judge was prejudiced and his attorney was incompetent [C. T. 2]. He filed an affidavit of bias with his motion and requested that Judge Carr be disqualified from hearing his motion. Judge Carr reviewed appellant's motion and on May 19, 1967, he denied the motion [C. T. 23]. Notice of Appeal was filed by appellant on July 12, 1967 [C. T. 37].

The District Court had jurisdiction of the motion, pursuant to Title 28, United States Code, Section 2255. This Court has jurisdiction on this appeal pursuant to Title 28, United States Code, Section 1291.

II

STATUTES INVOLVED

Title 28, United States Code, Section 2255, provides as follows:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws

^{2/} "C. T. " refers to Clerk's Transcript.

of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

" . . .

" . . .

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus. "

Title 28, United States Code, Section 144, provides as follows:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists. . . . "

III

STATEMENT OF FACTS

On March 8, 1965, appellant, with retained counsel, Thomas R. Cronin, appeared before Judge Carr and entered a plea of not guilty to the charges against him [R. T. 8]. 3/ Trial was set for March 29, 1965 [R. T. 9]. On March 29th, however,

3/ "R. T. " refers to Reporter's Transcript.

appellant withdrew his plea of not guilty and, again with retained counsel, entered pleas of guilty to two of the nine counts [R. T. 14]. After questioning appellant and his attorney, Judge Carr accepted appellant's plea [R. T. 18]. On April 26, 1965, Judge Carr, after hearing appellant's counsel and appellant, sentenced appellant to 30 years' imprisonment.

IV

SPECIFICATION OF ERRORS

Three questions emerge from the argument presented in appellant's opening brief:

1. Did the trial judge, who had previously accepted appellant's plea of guilty and had imposed sentence, err in failing to disqualify himself from presiding over appellant's motion?
2. Did the trial judge err in determining that appellant's Affidavit of Bias was legally insufficient to prevent him from reviewing appellant's motion?
3. Did the trial judge err in denying appellant's motion without a hearing?

V

ARGUMENT

- A. THAT THE TRIAL JUDGE HAD PREVIOUSLY ACCEPTED APPELLANT'S PLEA AND HAD IMPOSED SENTENCE DID NOT OF ITSELF PRECLUDE HIM FROM REVIEWING APPELLANT'S MOTION.
-

Appellant appears to contend that, even apart from the issue of bias, Judge Carr should not have reviewed his motion because he (Judge Carr), had made the original determinations in appellant's case. This contention, however, ignores one of the basic reasons Section 2255 was enacted. As stated in Carvell v. United States, 173 F.2d 348, 348-349 (4 Cir. 1949):

"Complaint is made that the judge who tried the case passed upon the motion. Not only was there no impropriety in this, but it is highly desirable in such cases that the motions be passed on by the judge who is familiar with the facts and circumstances surrounding the trial, and is consequently not likely to be misled by false allegations as to what occurred. It was to avoid the unseemly practice of having attacks upon the regularity of trials made before another judge through resort to habeas corpus that Section 2255 of Title 28 was inserted in the Judicial Code."

Accord: United States v. Smith, 337 F.2d 49 (4 Cir. 1964),

cert. denied 381 U.S. 916 (1965).

Appellant cites the case of Halliday v. United States, 380 F.2d 270 (1 Cir. 1967), as supporting his position. Appellee respectfully submits that the holding of the Halliday case is not applicable to the instant case. In the Halliday case, the court made it clear that its holding that it is improper for a sentencing judge to conduct an evidentiary hearing on a Section 2255 motion which challenges the validity of a prior determination by him does not mean " . . . that the sentencing judge cannot review a §2255 petition to conclude, if appropriate, that no evidentiary hearing is required." 380 F.2d at 274. (Emphasis added.) Moreover, the court pointed out that it reached its conclusion "not from any feeling of Constitutional compulsion" Ibid.

Not only is the holding of the Halliday case inapplicable to the instant case, the rule in this Circuit is contrary to appellant's contention. As this Court recently stated:

" . . . [A] judge who conducts the trial of a criminal case . . . is not thereafter disqualified from conducting a hearing pursuant to a motion instituted under the provisions of 28 U. S. C. § 2255. "

Battaglia v. United States, 390 F.2d 256, 259
(9 Cir. 1968);

Accord: Dillon v. United States, 307 F.2d 445,
453 (9 Cir. 1962), (Barnes, J., dissenting).

B. THE TRIAL JUDGE DID NOT ERR
IN RULING THAT APPELLANT'S
AFFIDAVIT OF BIAS WAS LEGALLY
INSUFFICIENT TO SHOW BIAS OR
PREJUDICE.

1. APPELLANT'S FILING OF THE
AFFIDAVIT OF BIAS DID NOT
PRECLUDE THE TRIAL JUDGE
FROM RULING ON THE LEGAL
SUFFICIENCY OF THE AFFIDAVIT.

It is settled in this Circuit that the mere filing of an affidavit of bias does not automatically require the trial judge to withdraw from the case. See Price v. Johnson, 125 F.2d 806 (9 Cir. 1942), cert. denied 316 U.S. 677 (1942), and Taylor v. United States, 179 F.2d 640 (9 Cir. 1950). Rather, the trial judge has a duty to review the affidavit and to determine whether it is legally sufficient to require his withdrawal. Price v. Johnson, supra, and Taylor v. United States, supra. Accord: United States v. Bell, 351 F.2d 868 (6 Cir. 1965), cert. denied 383 U.S. 947 (1966), and Behr v. Mine Safety Appliance Company, 233 F.2d 371 (3 Cir. 1956).

2. APPELLANT'S AFFIDAVIT OF
BIAS WAS LEGALLY INSUFFI-
CIENT TO SHOW THAT THE
TRIAL JUDGE WAS BIASED OR
PREJUDICED.

When appellant filed his motion he asked that it be assigned to a judge other than Judge Carr. As the basis for his request,

appellant listed, in his Affidavit of Bias, three statements of Judge Carr which purportedly show bias or prejudice. Bias or prejudice as a grounds for removal of a district judge in a case pending before him is governed by Section 144, Title 28, United States Code. This section provides that a district judge shall withdraw from a case when one of the parties files a "sufficient" affidavit alleging that the judge has a "personal bias or prejudice . . . against him" The affiant is required, however, to " . . . [s]tate the facts and reasons for the belief that bias or prejudice exists. . . ." Appellee respectfully submits that when appellant's affidavit is tested by the standards established by Section 144, it clearly is insufficient in that it does not show that the trial judge was personally biased or prejudiced against appellant.

In Point 1 in his affidavit, appellant merely alleges that statements of the trial judge " . . . as set forth in my writ show and prove his bias attitude." The statements to which appellant refers appear to be those found on page 13 of his motion [C. T. 2]. Even assuming the truthfulness of the alleged statements, both the statements were directed to persons other than appellant, were uttered in cases other than appellant's case and did not concern appellant at all. In fact, appellant cites only one instance in his motion where the trial judge made a statement to appellant. That statement, concerning the length of sentence the trial court would have imposed if appellant had not entered a plea of guilty [see C. T. 2 (page 7) and R. T. 34], does not show that the trial judge

was personally biased against the appellant. While the statement does illustrate the trial judge's determination to impose long sentences upon convicted armed bank robbers, it does not show personal bias or prejudice as to appellant. See Cole v. Loew's, Inc., 76 F. Supp. 872, 880 (D. C. S. D. Cal. 1948), rev'd. on other grounds 185 F.2d 641 (9 Cir. 1950).

Points two and three in appellant's affidavit similarly fail to show personal bias as to the defendant. In point two, appellant's allegation is not directed at showing bias but rather at showing that his plea of guilty was involuntary. In point three, which does appear to be directed at showing bias, appellant merely alleges that the trial judge, in open court, stated that "there will be no 2255's in this court, against this court." [C. T. 2 (page 18)]. This statement does not appear in the Reporter's Transcript of the proceedings involving appellant and nowhere in his affidavit or motion does appellant indicate that the alleged statement was made in his case or was directed to him. On the contrary, in his opening brief appellant states that the statement was made in a case other than his own and that he had no idea what a "2255" was at the time. Appellant's brief, p. 13. Even assuming that the trial judge did make the statement, appellee submits that it does not show bias but rather shows the trial judge's concern that the defendants receive all their legal rights.

When appellant's affidavit is considered in its entirety, it becomes clear that the affidavit does not contain any facts from which a reasonable man could infer that the trial judge was

personally biased against appellant. See Grimes v. United States, ___ F.2d ___ (9 Cir., June 6, 1968 #21,659). The affidavit merely sets out appellant's general conclusion that the trial judge was biased without stating any facts to support that conclusion. In the absence of any facts in the affidavit to support appellant's conclusion, the affidavit was clearly legally insufficient to establish personal bias on the part of the trial judge. See Berger v. United States, 255 U.S. 22 (1921); Wilkes v. United States, 80 F.2d 285 (9 Cir. 1935); Inland Freight Lines v. United States, 202 F.2d 169 (10 Cir. 1953); Fieldcrest Dairies, Inc. v. City of Chicago, 27 F. Supp. 258 (D.C. N.D. Ill. 1939); and United States v. Pendergrast, 34 F. Supp. 269 (D.C. W. D., Mo. 1940). The trial judge did not err, therefore, when he ruled that appellant's affidavit was legally insufficient to establish personal bias.

C. THE TRIAL JUDGE DID NOT ERR
IN DENYING APPELLANT'S MOTION
WITHOUT A HEARING.

Having determined that appellant's Affidavit of Bias was legally insufficient to require his withdrawal from this case, the trial judge was then free to act upon appellant's motion. See Eisler v. United States, 170 F.2d 273 (D.C. Cir. 1948), and Behr v. Mine Safety Appliances Company, supra. As noted previously, the trial judge denied, without a hearing, appellant's motion [C. T. 23]. Appellant now contends that the trial judge's

ruling was erroneous in that he can prove the allegations he made in his motion. Appellant's brief, p. 2.

It is settled that a trial judge is not required to hold a hearing every time a Section 2255 motion is filed in his court. See Machibroda v. United States, 368 U.S. 487, 495 (1961); United States v. Hill, 319 F.2d 653, 654 (6 Cir. 1963); Jones v. United States, 290 F.2d 216 (10 Cir. 1961); and Mirra v. United States, 255 F. Supp. 570 (D.C. S.D. N.Y. 1966), aff'd 379 F.2d 782, 787 (2 Cir. 1967). The trial judge may, in his discretion, deny the petition without a hearing if the " . . . files and records of the case conclusively show that [the] petitioner is entitled to no relief." Jones v. United States, supra, 290 F.2d at 217. Accord: Sweepston v. United States, 289 F.2d 166, 169 (8 Cir. 1961). Appellee respectfully submits that the files and records in this case do conclusively show that appellant is not entitled to any relief. Therefore, the trial judge did not err in denying appellant's motion without a hearing.

1. THE REPORTER'S TRANSCRIPT
CONCLUSIVELY SHOWS THAT
APPELLANT'S PLEA OF GUILTY
WAS NOT COERCED BY THE
TRIAL JUDGE.

Appellant contends that his plea of guilty was not voluntarily made but rather was the result of coercion by the trial judge. As appellant states, the cases clearly hold that a plea of guilty which is induced by comments or statements of the trial

judge, amounting to coercion, cannot stand. See Euziera v. United States, 249 F.2d 293 (10 Cir. 1957); United States v. Schmidt, 376 F.2d 751 (4 Cir. 1967); and United States v. Tateo, 214 F. Supp. 560 (D.C. S.D. N.Y. 1963). However, in each of these cases, the coercive comments were made by the trial judge to the defendant, or to the counsel for the defendant who relayed the comment to the defendant, prior to the time the defendant entered his plea of guilty. In appellant's case, on the other hand, the Reporter's Transcript shows that the trial judge had absolutely no conversation with appellant until after appellant had entered his plea of guilty [R. T. 6-8 and 13-14]. Further, the only conversation the trial judge had with appellant's attorney, until after appellant had entered his plea of guilty, occurred on the day appellant was arraigned and was limited to a discussion of the number of witnesses that appellant's attorney intended to call in defending appellant's case [R. T. 8 and 9].

In the instant case, the Reporter's Transcript shows that the trial judge did not initiate or suggest a plea of guilty. Rather appellant entered his plea prior to any conversation between himself and the trial judge. Appellee respectfully submits that this record conclusively shows that the trial judge did not coerce appellant into entering his plea of guilty.

2. THE REPORTER'S TRANSCRIPT
CONCLUSIVELY SHOWS THAT
APPELLANT WAS REPRESENTED
BY COMPETENT COUNSEL OF
HIS OWN CHOICE.

Appellant contends that he was misled into entering a plea of guilty by an incompetent counsel. Appellant's brief, p. 10. This Court has repeatedly held that the standard to be applied in evaluating the adequacy of trial counsel is that the counsel's performance must be so incompetent as to make the trial "a farce or a mockery of justice." Rivera v. United States, 318 F.2d 606, 608 (9 Cir. 1963), and cases cited therein, and Lyons v. United States, 325 F.2d 370, 377 (9 Cir. 1963). In appellant's case, however, appellant's counsel, Mr. Cronin, was not required to engage in an actual trial, he was merely required to assist appellant in determining whether to enter a plea of guilty. As the court in Scherk v. United States, pointed out:

"In a trial accused, usually a layman, is almost totally dependent upon trial counsel to adequately present his version of the facts and whatever defenses he might have to the trier of fact. A plea of guilty however does not involve such extensive reliance on counsel. As stated in Edwards v. United States, 103 U.S. App. D.C. 152, 256 F.2d 707 (1958):

" '* * * here there are not baffling complexities which require a lawyer for

illumination; if voluntarily and understandingly made, even a layman should expect a plea of guilty to be treated as an honest confession of guilt and a waiver of all defenses known and unknown. And such is the law.

A plea of guilty may not be withdrawn after sentence except to correct a "manifest injustice," and we find it difficult to imagine how "manifest injustice" could be shown except by proof that the plea was not voluntarily or understandingly made, or a showing that defendant was ignorant of his right to counsel. Certainly ineffective assistance of counsel, as opposed to ignorance of the right to counsel, is immaterial in an attempt to impeach a plea of guilty, except perhaps to the extent that it bears on the issues of voluntariness and understanding. ' 256 F.2d at 709, 710 (Emphasis added). "

242 F. Supp. 445, 447-8 (D. C. N. D. Cal., 1965), aff'd 354 F.2d 239 (9 Cir. 1965), cert. denied 382 U. S. 882 (1965).

The Reporter's Transcript shows that Mr. Cronin knew appellant "several" years prior to the time he represented appellant in the court below [R. T. 21]. It also shows that Mr.

Cronin appeared with appellant, as retained counsel, at the time that he was arraigned and again when he entered his plea, three weeks after the arraignment [R. T. 3, 6 and 13]. Prior to accepting appellant's plea, the trial judge inquired of Mr. Cronin whether he had consulted with the defendants, appellant and Mr. Villarreal, and whether he had discussed the charges with the defendants [R. T. 17-18]. Mr. Cronin answered affirmatively [R. T. 17-18].

Appellant's contention that his counsel was incompetent includes the allegation that his counsel was intimidated by the trial judge. As appellee has previously pointed out, the Reporter's Transcript shows that Mr. Cronin only had one brief discussion with the trial judge prior to the time appellant entered his plea of guilty [R. T. 8-10]. The transcript of that discussion does not, in any way, indicate that Mr. Cronin was intimidated by the trial judge [R. T. 8-10].

Appellee respectfully submits that the Reporter's Transcript conclusively shows that appellant was adequately represented by competent counsel of his own choosing. The proceedings in the court below were far from being a "farce"; rather, the Reporter's Transcript shows that Mr. Cronin ably represented appellant.

3. THE REPORTER'S TRANSCRIPT
CONCLUSIVELY SHOWS THAT
APPELLANT'S PLEA OF GUILTY
WAS KNOWINGLY AND VOLUN-
TARILY MADE.

The Reporter's Transcript shows that the trial judge questioned appellant in detail prior to accepting his plea [R. T. 13-16]. Under questioning by the trial judge, appellant stated, among other things, that no one had threatened him to make the plea; that he was making the plea of his own free will; that he knew what the maximum sentence that he might receive was; that he had discussed the matter with his counsel and that he was acting with the advice and consent of his counsel; and, that he was making the plea because he was guilty [R. T. 15-16]. Only after appellant and his counsel had assured the trial judge that they did not know of any reason why appellant's plea should not be accepted, did the trial judge accept appellant's plea [R. T. 16 and 18].

Appellant now, more than three years after he entered his plea, seeks to repudiate his plea. Appellant contends that he should be allowed to withdraw his plea of guilty in that it was involuntary because it was coerced by statements by the trial judge,^{4/} the prosecuting attorney and by a United States Marshal. Appellant's brief, p. 9.

^{4/} See appellee's discussion of this point, *supra*, pp. 12-13.

Appellee respectfully submits that appellant's allegation that his plea was coerced by statements by the prosecuting attorney did not justify the granting of a hearing in this case. Appellant's allegation is vague and is void of any factual support. Appellant's brief, p. 9. Further, appellant's allegation is contradicted by his statement in open court that no one had threatened him in any way to make his plea. Appellant's brief, p. 15.

Appellee also submits that appellant's allegation that his plea was coerced by statements by a United States Marshal did not justify the granting of a hearing. The alleged statement of the Marshal [appellant's brief, p. 9], shows only that the Marshal told appellant that the trial judge was strict with bank robbers and that he (appellant) should plead guilty if he were guilty. On its face, this statement is not coercive.

The principle applicable in this case was succinctly stated by the Court of Appeals for the Eighth Circuit in Burgett v. United States, 237 F.2d 247, 251 (8 Cir.1956), cert. denied 352 U.S. 1031 (1957):

"A defendant, having been represented by competent counsel, having been given every opportunity and right afforded by the law and having entered a plea of guilty, may not, without some reasonable basis, come into court years later and repudiate his prior plea. It is not the intent of Section 2255 . . . to require a hearing upon the mere assertion that a prior plea was false. To

so interpret the statute . . . is to say that every time a defendant desires to change his mind as to the reason for entering a plea a hearing must be held with the defendant present. "

Accord: Overman v. United States, 281 F.2d 497 (6 Cir. 1960).

Appellee respectfully submits that appellant's allegations do not constitute such a reasonable basis to allow him to repudiate his prior plea.

4. THE REPORTER'S TRANSCRIPT
CONCLUSIVELY SHOWS THAT
APPELLANT DID NOT RECEIVE
AN EXCESSIVE OR ILLEGAL
SENTENCE.

The Reporter's Transcript shows that appellant knew when he entered his plea of guilty that the trial judge could sentence him to fifty (50) years in prison [R. T. 15]. Instead of imposing the maximum sentence allowable by law, the trial judge sentenced appellant to thirty (30) years' imprisonment [R. T. 36]. Appellant's sentence is well within the limits fixed by Section 2113, Title 18, United States Code, and, therefore, appellant may not collaterally attack his sentence. See Jones v. United States, 323 F.2d 864 (10 Cir. 1963).

Despite the obvious fact that appellant's sentence is well within the statutory limits, appellant devotes the major portion of his brief to his attempt to show that the trial judge imposes long sentences on bank robbers. Appellant's brief, pp. 3-4 and 13-17.

Even if appellant could show that the trial judge does impose maximum sentences on convicted bank robbers, ^{5/} it does not necessarily follow that appellant was denied a fair hearing or was deprived of any of his rights. See Cole v. Loew's Inc., supra, 76 F. Supp. at 880.

In essence, appellant's motion and brief complain that the trial judge refused to give appellant a light sentence after he had entered his plea of guilty [C. T. 2 (pp. 13-14), and appellant's brief, 14-17]. Apparently, appellant hoped to receive a sentence of fifteen years' imprisonment [appellant's brief, p. 11]; instead of the hoped-for sentence, the trial judge imposed a more severe sentence. Appellee respectfully submits that this is not a sufficient ground for vacating the sentence imposed. See United States v. Page, 229 F.2d 91 (2 Cir. 1956), and Verdon v. United States, 296 F.2d 549 (8 Cir. 1961), cert. denied 370 U.S. 945 (1961).

^{5/} In fact, appellant fails to make such a showing. Appellant himself received a sentence considerably below the maximum allowable by law.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

GEORGE G. RAYBORN,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ George G. Rayborn
GEORGE G. RAYBORN

No.22,222 ✓

IN THE
United States Court of Appeals

FOR THE NINTH CIRCUIT

MARIA GOGUE CANDASO, as Administratrix
of the Estate of Prudencio Rivera Gogue,
deceased,

Appellant,

VS.

JOAQUIN V. E. MANIBUSAN, as Administra-
tor of the Estate of Isabel Rivera Gogue,
deceased,

Appellee.

APPELLANT'S OPENING BRIEF

On Appeal from the District Court of Guam.

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FILED

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SUBJECT INDEX

	Page
Judicial Statement.....	1
Statement of the Case.....	1
Statement of Facts.....	2
Specifications of Error.....	4
Argument.....	4
I. Lots 250, 297 and 336 Were Conveyed by Valid Deed and Any Reservation in the Recording Could Have No Effect on Grantee's Interest as Against the Claims of Third Parties	4
II. Recordation of a Deed is Unessential to Convey Title and Even if the Deed Had been Improperly Recorded, the Grantor is Estopped to Deny the Legal Effect of the Deed	6
III. The Defendant Estate Has No Claim of Record Whatsoever	7
IV. The Mere Payment of Taxes is Insufficient to Vest Title to Property	8
V. Defendant State Neither Pleaded Nor Proved Adverse Possession	8
VI. The Marketable Title Act, If Applicable, Aids Plaintiff But Not the Defendants.....	9
VII. Though Defendants Neither Cited Nor Presented Any Prior Laws of Guam, the Court Apparently Based Its Decision on Its Understanding of Those Laws Without Any Citations. Even If We Assume That the Court's Understanding of the Prior Guam Law is Correct, the Decision is Still Wrong.....	10
Conclusion.....	11
Certificate of Counsel.....	13
Appendix	15

TABLE OF AUTHORITIES CITED

CASES

	Page
Chaffee v. Sorensen, 107 C.A. 2d 284, 236 P. 2d 851.....	7
Cox v. Schnerr, 172 Cal. 371, 156 P. 509.....	11
Hunter v. Watson, 12 Cal. 363.....	6
McGorray v. Robinson, 135 Cal. 312, 67 P. 279.....	11
McMillan v. O'Brien, 219 Cal. 775, 29 P. 2d 183, 91 A.L.R. 383....	8
Perez v. Herrero Estate, 333 F. 2d 1014, 1015 (9th Cir. 1964).....	10
Rix v. Horstmann, 93 Cal. 502, 29 P. 120.....	9
Stanley v. Westover, 93 C.A. 97, 269 P. 468.....	8
Younger v. Moore, 155 Cal. 767, 103 P. 221.....	6

CODES

Guam Civil Code	
§1106.....	6
§§1214 and 1217.....	6
§§1218 et. seq.....	9
Guam Code of Civil Procedure	
§321.....	10
§322.....	9
§1962(2).....	11
United States Code	
Title 28, §§1291 and 1294.....	1
Title 48, §1424	1

TEXTS

2 Cal. Jur. 2d 541.....	9
12 Cal. Jur. 2d 619-620.....	6

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JOAQUIN V. E. MANIBUSAN, as Administra-
tor of the Estate of Isabel Rivera Gogue,
deceased,

Appellee.

APPELLANT'S OPENING BRIEF

On Appeal from the District Court of Guam.

JUDICIAL STATEMENT.

Jurisdiction of this action is vested in the District Court of Guam and on appeal in the United States Court of Appeals for the Ninth Circuit by Title 48, §1424, United States Code, and by the provisions of §§1291 and 1294, Title 28, United States Code.

STATEMENT OF THE CASE.

Maria Gogue Candaso, as Administratrix of the Estate of Prudencio Rivera Gogue, filed an action to

quiet title on three parcels of land claimed by the Prudencio Gogue Estate (C.T. 1).^{*} Claimants to the property named as defendants are Joaquin V. E. Manibusan, as Administrator of the Estate of Isabel Rivera Gogue, and defendants Gregory, grantees under a deed from one of the heirs of the Isabel Rivera Gogue Estate. A third party complaint against Jesus Torres named as third party defendant is irrelevant to this appeal.

Defendant Manibusan answered (C.T. 11) generally denying the allegations of the complaint and raising no affirmative defenses. Defendants Gregory answered (C.T. 9) alleging a conveyance to them from Vicente Gogue, a son of Isabel Rivera Gogue, and raising no affirmative defenses.

After trial, the District Court of Guam dismissed plaintiff's complaint holding that title to the three disputed parcels of property was in the Estate of Isabel Rivera Gogue (R.T. 94). From this judgment, plaintiff has appealed.

STATEMENT OF FACTS.

Isabel Rivera Gogue had three children; Prudencio, Vicente, and Joaquina. In 1915, Isabel Rivera Gogue conveyed Lots 297 Soyafe, 366 Soyafe, an Asleno parcel, and 250 Aang, all in the Municipality of Merizo, Guam, to her son Prudencio. Prudencio died July 12, 1920; Joaquina died in 1965, and Vi-

^{*}(C.T. refers to Clerk's Transcript and R.T. to Reporter's Transcript.)

cente survives (R.T. 79). In 1964, Vicente, though then the administrator of his mother's estate which had not been closed, purported to convey one of the lots in question to defendants Gregory. He did this individually and not as administrator of the estate and the sale was never approved by the Island Court.

This action thereafter arose when the Gregorlys went into possession in 1964. Plaintiff is the descendent of Prudencio and heir to his estate and the defendants are heirs to the estate of Isabel Rivera Gogue.

At the trial a deed dated August 3, 1915 from Isabel Rivera Gogue, as grantor, to Prudencio Gogue, as grantee, was proved and admitted into evidence without objection (R.T. 24). The deed was recorded with cautionary instructions on August 9, 1915 (C.T. 7). The recording was made definite on June 2, 1926 (Plaintiff's Exh. 2). There was testimony that taxes had been paid from 1953 to 1966 but no definite evidence was introduced as to who paid them, nor were the tax receipts introduced as evidence (R.T. 57-59). There was some evidence that Joaquina Gogue Flores and her husband had paid some taxes but these taxes were not necessarily paid for the estate of Isabel Rivera Gogue any more than they were paid for the estate of Prudencio Gogue, who was a brother of Joaquina (R.T. 80). Adverse possession on the part of defendants was neither pleaded nor proved.

SPECIFICATIONS OF ERROR.

1. The District Court of Guam erred in holding that the deed from Isabel Rivera Gogue to Prudencio Gogue was void and of no effect.

2. The District Court of Guam erred in concluding that the voluntary payment of taxes with no other elements of adverse possession may effect title to land when no assertion of adverse possession was made by defendants.

3. The District Court of Guam erred in holding and deciding that under the applicable laws of Guam, the reservation of recording had any bearing or effect on the right of Isabel Rivera Gogue to convey her interest in real property as done by her deed in 1915.

ARGUMENT.**I.**

LOTS 250, 297 AND 336 WERE CONVEYED BY VALID DEED AND ANY RESERVATION IN THE RECORDING COULD HAVE NO EFFECT ON GRANTEE'S INTEREST AS AGAINST THE CLAIMS OF THIRD PARTIES.

A warranty deed, duly witnessed, acknowledged, and approved was executed by Isabel Rivera Gogue as grantor on the 3rd day of August, 1915, in favor of her son Prudencio. This deed was approved by the Governor of Guam with cautionary notices at the request of Prudencio and recorded in the Department of Land Management, Government of Guam (Plain-

tiff's Exh. 1). The court nevertheless held that the deed was invalid and conveyed no interest to Prudencio because of the cautionary notice. Even if the court was correct on that point, it is clear that the cautionary notices were removed and the document definitely recorded on the 2nd day of June, 1926 (Plaintiff's Exh. 2). The court's conclusion that the cautionary notices invalidated the deed was contrary to any known rule of law. The cautionary notice was undoubtedly inserted to warn any prospective third party purchaser from Prudencio and could have no effect on the grant between mother and son.

It is further apparent that there were four lots referred to in the original 1915 deed. Lots 297 and 336 were not denied recordation for any reason. A tract known as Aang, or Lot 250, was denied recordation on the cautionary basis for the reason that the grantor was not shown to be the owner in the registry at the time of her deed (R.T. 46). The fourth parcel called Asleno was also included in the deed but it was undefined. Because of that there was a cautionary instruction as to the Asleno lot also.

Since the court refused to give the deed any effect whatsoever and based its decision upon the cautionary instructions, it seems that the court was entirely wrong as to Lots 297 and 336. Appellant also contends that the court was wrong as to Lot 250. Assuming that the grantor showed no record title as of the

time of her grant, the deed nevertheless operated to subsequently pass title. Defendants contend of course that the estate of Isabel Rivera Gogue owns all four parcels. §1106 of the Guam Civil Code provides that where a person purports by a proper instrument to grant real property in fee simple and subsequently acquires any title or claim of title, the same passes by operation of law to the grantee or his successors. It has also been held that a deed purporting to convey a fee simple has, as a matter of law, the same effect as if it contained an express provision that the grantor conveyed all the estate he then possessed or he might thereafter acquire. *Younger v. Moore*, 155 Cal. 767, 103 P. 221, 15 Cal. Jur. 2d 619-620.

II.

RECORDATION OF A DEED IS UNESSENTIAL TO CONVEY TITLE AND EVEN IF THE DEED HAD BEEN IMPROPERLY RECORDED, THE GRANTOR IS ESTOPPED TO DENY THE LEGAL EFFECT OF THE DEED.

An unrecorded conveyance is valid against all the world except subsequent purchasers or encumbrancers in good faith for a valuable consideration whose instrument is first recorded. Guam Civil Code, §§1214 and 1217.

While the recordation of a deed gives rise to a rebuttable presumption that it was duly executed and delivered, recordation is not essential in order that an instrument may be operative as a deed. *Hunter v.*

Watson, 12 Cal. 363; *Chaffee v. Sorensen*, 107 C.A. 2d 284, 236 P. 2d 851.

III.

THE DEFENDANT ESTATE HAS NO CLAIM OF RECORD WHATSOEVER.

The only claim of record the defendant estate had of any sort was the two maps dated 1934 which were introduced into evidence as Plaintiff's Exhibits 3 and 4. However, the court did not think that these maps were in any point important and certainly did not base its decision on these maps. Mrs. Joaquina Gogue Flores, a daughter of Isabel Rivera Gogue, had signed the maps at the request of the Navy as to three of the parcels. In this connection the court said:

“But I wouldn't think that merely signing the map would be any proof of title.” (R.T. 43)

The court is correct in this and since there is no documentary proof of title other than the deed of 1915, the only claim that the heirs of Isabel Rivera Gogue have is that they somehow acquired title because they alleged they paid some taxes. It is not alleged that the estate paid the taxes but only one of the heirs, Joaquina Gogue Flores paid taxes. It is just as conceivable that Joaquina, being the sister of Prudencio, paid the taxes on his behalf. It is also conceivable that Mrs. Flores took advantage of the fact that Prudencio died in 1920 and the fact also

that the tax office apparently failed to change the name on the tax records.

IV.

THE MERE PAYMENT OF TAXES IS INSUFFICIENT TO VEST TITLE TO PROPERTY.

Where there has been no tax sale, and the taxes have been paid on property by a party other than the owner, and the owner brings an action to quiet title, unless the payment of the taxes grew out of or was necessarily involved in the subject matter of the controversy, the person who paid the taxes is not entitled to reimbursement as a condition of quieting title. *Stanley v. Westover*, 93 C.A. 97, 269 P. 468. One who pays taxes under a mistaken belief in his ownership is a volunteer and is not entitled to a judgment for taxes. *McMillan v. O'Brien*, 219 Cal. 775, 29 P. 2d 183, 91 A.L.R. 383.

V.

DEFENDANT ESTATE NEITHER PLEADED NOR PROVED ADVERSE POSSESSION.

No showing was made whatsoever of the essential elements for adverse possession on the part of defendant. Further, where family relationship exists between the owner and the occupant of property, the possession of the occupant will not be considered

adverse in the absence of a positive showing of the assertion of the hostile claim and notice thereof to the owner. *Rix v. Horstmann*, 93 Cal. 502, 29 P. 120. Further, no possession of any kind was proved by defendants. One claiming a right to property by adverse possession must establish his right either by a claim of title founded upon possession, but without color of title, or upon possession by color of title founded upon a written instrument, judgment or decree. Guam Code of Civil Procedure, §322. Actual possession cannot be shown for purposes of attaining title by adverse possession by merely showing the payment of taxes, or occasional acts such as the cutting of timber, hay, grass or weeds. 2 Cal. Jur. 2d 541.

VI.

THE MARKETABLE TITLE ACT, IF APPLICABLE, AIDS PLAINTIFF BUT NOT THE DEFENDANTS.

Some reference was made to the Marketable Title Act by counsel for defendant and by the court (C.T. 13) (R.T. 45). The Marketable Title Act, Guam Civil Code, §§1218 et. seq., aids the plaintiff and not the defendant estate. §1218.2 provides that a person shall be deemed to have the unbroken chain of title to an interest in land if he is in possession and has record title prior to January 1, 1935. Anyone opposing the claim must have filed a claim before August 1, 1960. Obviously this was not done by defendants and since they have no record title, the Act does not assist

them. Plaintiff is assisted by the Act, however, and conclusively so. He and his successors had a good and valid record title and were presumptively in possession. Guam Code of Civil Procedure, §321.

VII.

THOUGH DEFENDANTS NEITHER CITED NOR PRESENTED ANY PRIOR LAWS OF GUAM, THE COURT APPARENTLY BASED ITS DECISION ON ITS UNDERSTANDING OF THOSE LAWS WITHOUT ANY CITATIONS. EVEN IF WE ASSUME THAT THE COURT'S UNDERSTANDING OF THE PRIOR GUAM LAW IS CORRECT, THE DECISION IS STILL WRONG.

The court apparently based its decision on its understanding of prior Guam law that it was the policy of the naval government to prohibit transfer of land to any person who was not a Guamanian (R.T. 92). The court then goes on to conclude that the cautionary instructions originally attached to the deed had the effect of voiding the deed. The court also went on to conclude that there was no indication that Prudencio ever attempted to exercise dominion over the properties or the rights of ownership. No citation is given for that statement and it is submitted that under present Guam law and prior Guam law, no such conclusion is justifiable.

Appellant knows of no such Guam law to justify those conclusions, and as this court has held in *Perez v. Herrero Estate*, 333 F. 2d 1014, 1015 (9th Cir.

1964), one resorting to the prior law of Guam should indicate what it is by appropriate citation. In the orderly administration of justice, this should be a requirement and the burden should be on defendants to show what prior laws defeated plaintiff's deed. Since this has not been shown, it is submitted that the deed is good and valid on its face and conveyed good title to the plaintiff.

CONCLUSION.

A prima facie case of title was established by a deed to plaintiff from one under whom his adversary claims, duly signed, acknowledged, and recorded. *McGorray v. Robinson*, 135 Cal. 312, 67 P. 279. A conclusive statutory presumption exists on the truth of the facts recited in a written instrument between the parties thereto. Guam Code of Civil Procedure, §1962(2). The production of a deed in a quiet title action by the grantee carries with it the presumption that the deed was duly delivered to him. *Cox v. Schnerr*, 172 Cal. 371, 156 P. 509.

Although the court in its decision tends to rely upon such theories of law as "abandonment," "failure to exercise dominion," and "payment of taxes by another," the findings of fact do not contain any references relative to these legal theories. The findings of fact hold only that the deed to Prudencio was denied recordation and was therefore void and that

the deed conveyed no property to Prudencio. It is, therefore, submitted that the judgment of the District Court of Guam should be reversed with instructions to enter judgment in favor of plaintiff.

Dated February 1, 1968, at Oakland, California.

Respectfully submitted,

BARRETT, FERENZ, TRAPP & GAYLE
By W. SCOTT BARRETT

Attorneys for Appellant

CERTIFICATE OF COUNSEL.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules. *and 39*

W. SCOTT BARRETT,
Attorney for Appellant

APPENDIX

APPENDIX.

Table of Exhibits pursuant to Rules 18(2) (f) :

No.	Offered	Received	Description
1	17	24	Copy, 1915 Deed
2	17-29	34	Copy, Recordation Estate No. 22, 85
3	29	43	1934 Map, Re Lots 297, 336
4	31	43	1934 Map, Re Lot 250
A	75	76	Decision, Probate Case 78-64, 9-9-66

NO. 22223

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROGER MAGUIRE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.
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FILED

FEB 29 1968

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MAR 7 1968

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TOPICAL INDEX

Page

Table of Authorities	iii
I JURISDICTIONAL STATEMENT	1
II STATEMENT OF THE CASE	1
III ERROR SPECIFIED	2
QUESTIONS PRESENTED	2
IV STATEMENT OF THE FACTS	4
A. Legal preliminaries	4
B. Trial	5
V ARGUMENT	8
A. SUFFICIENT WARNING OF HIS CONSTITUTIONAL RIGHTS WAS GIVEN THE APPELLANT.	8
B. THE COURT'S JURY INSTRUCTIONS COMPLIED WITH THE MIRANDA DOCTRINE.	12
C. THE SEARCH OF APPELLANT'S AUTOMOBILE WAS LEGAL AND THE RENTAL AGREEMENT FOUND THEREIN WAS ADMISSIBLE.	14
D. CONCLUDING REMARKS	15
Venue	15
Confrontation of witnesses and opportunity to present an adequate defense	15
Speedy trial	16
Right to Counsel	16

Transcript

16

VI CONCLUSION

16

CERTIFICATE

17

Table of Authorities

(Cases)	<u>Page</u>
Chapman v. California 386 U. S. 18 (1967)	11
Cooper v. California 386 U. S. 58 (1967)	14
Miranda v. Arizona 384 U. S. 436 (1966)	10
Murgia v. United States 285 F.2d. 14, 9th Cir. 1960	14
Warden, Maryland Penitentiary v. Hayden 87 S. Ct. 1642 (1967)	14

STATUTES

Title 18, United States Code, Sections 3231 and 2312	1
Section 4208 (a)(2)	2
Title 28, United States Code, Sections 1291 and 1294	1
Tariff Act of 1930	
19 U. S. C. 1581 (a)	12
19 U. S. C. 1582 (19 C.F.R. 23.1)	14

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROGER MAGUIRE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in the one count indictment for transportation of a stolen motor vehicle in foreign commerce following a trial by jury.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 3231 and 2312. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

The indictment was in one count only and charged that appellant

knowingly and intentionally transported a stolen motor vehicle in foreign commerce (C.R. 2).^{1/}

Jury trial commenced on May 25, 1967, before United States District Judge Fred Kunzel (C.R. 160, R. T. 80-81).^{2/} Appellant was found guilty on the same date and was sentenced on June 2, 1967, to the custody of the Attorney General for a period of five (5) years to run concurrent with a sentence appellant was then serving, and pursuant to Title 18, United States Code 4208 (a)(2) to be eligible for parole at such time as may be determined by the Board of Parole (C.R. 168).

III

ERROR SPECIFIED

Appellant specified the following points upon appeal:

QUESTIONS PRESENTED

- "1. Was sufficient warning given concerning constitutional rights, before interrogation by the Federal Authorities in compliance with the Miranda Doctrine?
- "2. Was sufficient warning given concerning constitutional rights, before interrogation by the United States Customs authorities in compliance with the Miranda and Dorado Doctrines?
- "3. Was sufficient warning given concerning constitutional

1/

"C.R." refers to the Clerk's Record on Appeal.

2/

"R.T." refers to the Reporter's Transcript of Proceedings.

rights , before interrogation after reaching the accusatory stage by California State Authorities in compliance with the Miranda and Dorado Doctrines?

- "4. Did the Court's Jury instruction fail to comply to the Miranda Doctrine?
- "5. Was inadmissible evidence obtained by a search of appellant's automobile immediately subsequent to arrest?
- "6. Was proper venue denied by the United States District Court , in and for the Southern District of California , resulting in inability to present an adequate defense?
- "7. Did the United States District Court effectively and unjustly deprive the appellant of his right to be confronted by his witness , which he had motion to be subpoenaed for his trial , especially the chief witness and only witness , which could show intent and establish whether a corpus delicti had been committed in violation of the Federal Statute of law?
- "8. Did the United States District Court effectively and unjustly deprive the appellant of his constitutional right of a speedy trial?
- "9. Did the United States District Court effectively and unjustly deprive appellant the right as counsel of his own defense of adequately preparing his defense by permitting

State Authorities at the San Diego County jail to violate Federal Court Order in confiscating, censoring, mutilating and destroying brief notes intended for use at his trial and was 'cruel and unusual punishment' inflicted by having him placed in a dark solitary confinement cell to deter appellant from preparing an adequate defense for a trial?

"10. Did the United States District Court effectively and unjustly deprive the appellant of effective and adequate representation of counsel for his defense and the right to have further counsel appointed of his own choice to defend his trial?

"11. Did the appellee effectively and unjustly deprive the appellant of his entire transcript of record, Volume I, to perfect his appeal?"

IV

STATEMENT OF THE FACTS

A. Legal preliminaries: On December 19, 1966, the appellant failed to appear for arraignment and plea, his bond was forfeited and a bench warrant issued for his arrest (R.T. 4). On February 27, 1967, the trial court agreed to change venue of the case to Maine if the appellant would stipulate to the facts which occurred in San Diego, California (R.T. 19). The stipulation appeared very fair to appellant's counsel (R.T. 27). During this period appellant was confined elsewhere after having been released on

his own recognizance by the Trial Court (R.T. 7, 9, 34). On May 8, 1967, appellant was arraigned, his plea entered and his motion for change of venue denied (R.T. 36-39). Appointed Counsel was relieved and appointed as stand-by Counsel at appellant's request (R. T. 34-36, 38-39). On appellant's motion for a speedy trial, trial was set for May 23 (R.T. 40-41). Appellant's motion to suppress was set for May 22 (R.T. 42-43). The trial court released materials to appellant for use in jail in connection with another appeal of appellant (R.T. 54-55). On May 23 appellant made a motion for continuance because he had been deprived of the use of his materials (Separate transcript, p. 2). Witnesses had been subpoenaed from Maine and were present and made available to appellant for interview (separate transcript, p. 11), and the appellant was given a continuance of two days to interview the witnesses and study his own statement, the car rental contract, and the statements of the witnesses, which had been provided by the government but taken from appellant by the jailer (separate transcript, and R. T. 61).

Appellant also requested a continuance because the witness who rented the car was not available (separate transcript, p. 12) and requested a change of venue on the above ground (R.T. 76). The government had subpoenaed said witness but was unable to locate him (R. T. 76-78, separate transcript, p. 12-13).

B. Trial: On October 7, 1966, in Maine, the Portland Auto Renting Company rented a blue Dodge Station Wagon, registration number 405-983, to a person giving the name "Galen Knowles" (R.T. 85-87). The automobile

was to be returned on October 8 and was reported stolen on that date (R.T. 89). The contract was signed for the company by Saul Arnold, who was no longer employed by the company, and the Assistant Treasurer, Mollie Weisman, did not know where he was (R.T. 90-91).

Glen Knowles identified exhibits 2-A through 2-I except for 2-B as cards lost by him the end of September or the middle of October, and noted that 2-H, his driver's license, had his birth date changed from 9-25-43 to 9-25-23 (R.T. 92-94). He testified he did not rent a 1964 Station Wagon and did not give appellant nor anyone else permission to rent a car in his name (R.T. 95). Nor did he give appellant or anyone else permission to use the exhibits (R.T. 95).

United States Customs inspector Cardwell testified appellant drove a 1964 Dodge Station Wagon with Maine plates from Mexico to the United States at San Ysidro, California, on November 11, 1966 (R.T. 99). Because of the appellant's attitude and behavior, he was referred to the inspection area (R.T. 100). Because of appellant's behavior, Inspector Cardwell thought appellant may have been smuggling some type of contraband (R.T. 101).

The San Diego police officer, Mr. Hammon, saw the appellant at the inspection area on November 11, 1966, and advised him of his constitutional rights (R.T. 103-105).

Out of the presence of the jury, both police officer Hammon and FBI agent Turnage testified they warned appellant of his constitutional rights and appellant testified they did not. The court ruled the admonitions conformed

to the law and that Hammon and Turnage did in fact give them (R.T. 105-128) . Appellant consented to the court's ruling on the entire matter of admonition (R.T. 127) .

Again, before the jury, officer Hammon testified he found the identification cards on the counter, that appellant stated his name was Galen Knowles, that the driver's license, draft card, and gas credit card, all in the name of Galen Knowles were his (R. T. 128-129). Officer Hammon also testified appellant stated the rental agreement (Government's Exhibit No. 1) was for the 1964 Dodge and that he (appellant) rented it (R.T. 129-130) .

Inspector Cardwell testified he had appellant put the contents of his pockets on the counter, but he (Cardwell) may have gotten the rental agreement out of the car (R.T. 131-132). He further testified he was making a regular custom's search and the appellant had zig-zag cigarette papers on him which made Cardwell suspect the presence of marihuana (R.T. 133) .

During questioning at the inspection area by Officer Hammon, appellant stated in reference to the contract (Government's Exhibit 1) that he rented the car, that he was not making rental payments at the time, that he was Galen Knowles, and when asked about the 100 mile restriction in the contract "just sat there and smiled" (R.T. 143-145). There were so many pieces of identification that the officer could not remember all the names (R.T. 147). Appellant stated he had found the credit cards and had allowed friends to use Harry Olson's (R.T. 148). Appellant's responses about the automobile were extremely vague (R.T. 149) .

The appellant was first questioned about 40 feet from the International

Boundary and was required to go from there to the inspection area (R.T. 151-153). The car registration or plates coincided with the rental agreement (R.T. 153-155).

When questioned by the FBI agent, appellant signed the waiver (Government's Exhibit 3) as "Galen E. Knowles" and then said his true name was Harold C. Gore (R. T. 156). He stated he had been using "Galen Earl Knowles" for approximately one and one-half months and that he got permission to drive to Boston, Massachusetts, from the rental agency (R.T. 156-157). He said he knew Knowles and that Knowles wouldn't press charges (R.T. 158).

The appellant did not testify at the trial (R.T. 16). Motion for Judgment of Acquittal was denied (R. T. 159).

V

ARGUMENT

A. SUFFICIENT WARNING OF HIS CONSTITUTIONAL RIGHTS
WAS GIVEN THE APPELLANT.

Appellant argues he was not given sufficient warning of his rights by either officer Hammon or F.B.I. Agent Turnage (Appellant's argument 1 and 3). The record indicates otherwise.

The San Diego police officer, George Hammon, advised the appellant before questioning him at the Customs inspection area. In fact, the first thing he did after entering the office and finding out the problem was to tell Mr. Maguire to remain silent so he could advise him of his constitutional

rights (R.T. 104-105). He then testified, "I explained to Mr. Maguire that he had a right to an attorney at this particular time if he chose so; he had a right to remain silent; he had a right not to answer any of my questions if he chose to do so; and that if Mr. Maguire couldn't afford an attorney, that the State would provide him one. And the defendant said he understood . . . this admonishment." (R.T. 105).

"I admonished the, Mr. Maguire, that he had a right to remain silent; didn't have to answer any of my questions. I advised Mr. Maguire that he had a right to an attorney - - then and now; at that time he had a right to an attorney; also I advised the, the, Mr. Maguire, that if he couldn't afford an attorney, that the State would provide him one free." (R.T. 109); and, "any statements that you make can and will be used against you in court by myself." (R.T. 110).

No question of voluntariness arose at the trial. (R.T. 110-111).

F. B. I. agent Turnage advised appellant pursuant to the written waiver form (Government Exhibit 3). This form was read to appellant (R.T. 113). It is interesting to note that appellant's statement to Turnage was made on November 14, 1967, three days after his arrest and the admonishments given by officer Hammon.

Thus, appellant was advised of his rights by two different officers of two different agencies, the San Diego police and the F. B. I., on two separate and distinct occasions.

Appellant's argument in this regard merely rehashes the credibility

of the officers which the trial court was in a much better position to analyse than this court. Furthermore, Government's Exhibit 3, a written document signed by the appellant clearly substantiates the officers.

Miranda v. Arizona, 384 U.S. 436 (1966), is not the open sesame that appellant seems to think. Its holding was summarized by the court as follows:

"To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But

unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." (384 U.S. 436 at p. 478-479).

It is submitted that the record as quoted above and Government's Exhibit 3 show a definite compliance with Miranda, both as to the letter and the spirit thereof.

Appellant contends (appellant's argument 3, p. 15-16 of his brief) that Customs inspector Cardwell's questions at the international line when appellant sought entry to the United States violated his rights under Miranda. Yet no statements of appellant other than that he was a United States Citizen and that he had made no purchases (R.T. 100 and 101) was introduced at the trial. Even assuming that Miranda applies, which appears ridiculous, no objection to the introduction of the statements was made at the trial. It would appear that no objection was made because the appellant was in no-wise prejudiced by them, and certainly this court should not reverse if the appellant has not been prejudiced in some way at the trial. Thus, even if Miranda applies to Cardwell's questions, the error was harmless and harmless constitutional error does not require a reversal (Chapman v. California, 386 U. S. 18 (1967)).

In any event, from the record it is doubtful that Mr. Cardwell ever "interrogated" the appellant, at least insofar as beyond the normal routine of questions asked all persons seeking entry into the United States. No other evidence in that regard was elicited and Cardwell could not even

remember any questions beyond appellant's citizenship and purchases in Mexico (R.T. 101). It is apparent from the record that Cardwell's questions were to determine whether or not appellant should be referred to the inspection area or be allowed to proceed inland without further ado. If Miranda prevents these questions, then the United States Immigration and Customs services might as well close up shop. In fact, it is difficult to conceive of the Supreme Court holding that the qualifications in Miranda that the suspect be "in custody" or "otherwise deprived of his freedom in any significant way" would be applied to border situations where those seeking entry to the United States are stopped at the line and questioned preliminarily to determine if searches will be made. The Tariff Act of 1930 permits such searches (19 U.S.C. 1581(a)), and without such questions every vehicle and person entering the United States would have to be searched which would impose an intolerable burden not only on the Government but also on those seeking entry.

B. THE COURT'S JURY INSTRUCTIONS COMPLIED WITH THE
MIRANDA DOCTRINE.

Appellant argues that the court's jury instruction was erroneous (appellant's argument 4, brief p. 23-36). The court ruled (out of the presence of the jury) that the admonitions given by the officers conformed to law and that they were in fact given (R. T. 127). The appellant raised no question as to voluntariness of his statements (R. T. 110-111) and consented to the court ruling on the entire matter (R. T. 127), but nevertheless the court instructed the jury as follows:

"All evidence relating to any oral admission or oral confession or any oral incriminating statement claimed to have been made by the defendant outside of court should be considered with caution and weighed with great care.

"In this case there were such admissions or statements made by the defendant outside of court, and you are required - - strike that for the moment.

"The circumstances surrounding the making of such statements are subject to careful scrutiny in order to determine whether such statements were made by the defendant voluntarily and understandingly.

"If the evidence does not convince you beyond all reasonable doubt the statements were made voluntarily and understandingly, you should disregard them entirely. On the other hand, if the evidence does show beyond a reasonable doubt that the statements were in fact made voluntarily and understandingly, you should consider it as evidence. You shall consider the statements as evidence against the defendant." (R.T. 178-179).

The appellant in his argument 4 mistakenly assumes that the court gave the jury instruction discussed in the proceedings outside the presence of the jury during the voir dire of the officers (R.T. 125). That instruction was not given and so it doesn't matter whether it was correct or incorrect according to the "Miranda doctrine".

C. THE SEARCH OF APPELLANT'S AUTOMOBILE WAS LEGAL
AND THE RENTAL AGREEMENT FOUND THEREIN WAS
ADMISSIBLE.

Appellant argues that the evidence obtained through search of the automobile was inadmissible (argument 5, appellant's brief p. 26-36).

The automobile was searched at the Customs secondary inspection area at the border immediately after appellant had emptied his pockets at Customs Inspector Cardwell's request (R.T. 132). It was searched because appellant had a lot of baggage and Inspector Cardwell wanted to see what was inside (R.T. 132) and because appellant had zig-zag cigarette papers on him which made Cardwell suspect appellant may have had marihuana (R.T. 133). Appellant had been brought to the inspection area for a more thorough search because of his attitude and behavior in answering Cardwell's questions at the line (primary inspection area) (R. T. 100, 101).

Such searches are permitted by the Tariff Act cited above and pursuant to regulations empowered by 19 U.S.C. 1582 (19 C.F.R. 23.1). The constitutionality of customs searches under these provisions has been sustained (Murgia v. United States, 285 F.2d. 14, 9th Cir. 1960).

And if the search was legal, then the seizure of the documents, specifically the rental agreement (Government's Exhibit 1), was legal and hence admissible.

Warden, Maryland Penitentiary v. Hayden, 87 S. Ct. 1642 (1967)

Cooper v. California, 386 U. S. 58 (1967)

D. CONCLUDING REMARKS.

Due to the press of trial work, the government is unable to compete this brief within the time limits set, but in regard to appellant's remaining arguments so far unanswered herein, appellee has the following short concluding comments:

Venue (appellant's argument 6): Change of venue is discretionary with the trial court and the basic question is merely whether or not the appellant has been afforded due process of law. The record clearly indicates appellant was afforded due process and certainly the trial court did not abuse its discretion in denying the motion for the change of venue. It is clear from the record that the court actually desired to change venue but in the face of government opposition and lack of cooperation of the appellant felt compelled to deny the motion.

Confrontation of witnesses and opportunity to present an adequate defense (appellant's arguments 6 and 7): The "chief witness" appellant complains of as having been absent was, as is shown in the record, subpoenaed but not found. Furthermore, appellant was complaining about lack of speedy trial. What was the court to do - grant further continuances, hire detectives for the appellant, or what? The appellant was not only given zeroxed copies of his own statements prior to the trial, but also those of the contemplated government witnesses plus the opportunity to interview those who were brought out from Maine and forced to wait two days while appellant further "prepared" his case.

Speedy trial (appellant's argument 8): On the one hand the appellant demanded a speedy trial and on the other continuance to search for witnesses and prepare for trial.

The original delays were caused by appellant's "skipping" of bail and later his confinement elsewhere plus the various motions he made, in particular the motion for change of venue. He was finally arraigned on May 8, 1967, and his trial set for only two weeks later, May 23, 1967. In view of the Southern District's trial calendar, this was a speedy trial indeed.

Right to Counsel (appellant's argument 9 and 10): The record clearly shows the diligence of the court in supplying appellant with counsel and affording appellant an opportunity to not only have counsel but also to act in pro per with standby counsel and to have access to multitudinous materials at the jail.

Transcript (appellant's argument 11): As far as the government knows, appellant has been provided with the entire transcript of record.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that judgment of the court below should be affirmed.

Respectfully submitted,

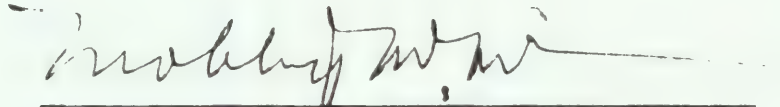
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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



MOBLEY M. MILAM

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUL 1 1968

WILLIAM G. EVERETT

Appellant

vs.

JOE W. VON BRIMER

Appellee

APPELLANT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FILED

JUL 1 1968

WM. B. LUCK, CLERK

William G. Everett
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Los Angeles, California 90042
In Propria Personum

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Subject Index

	Page
Table of Authoritiesii
Statement of Jurisdiction	1
Concise Statement of the Case	2
Specification of Errors	3
Summary of Argument	4
I. Rule 45(b)(1) Provides for Protective Relief	5
II. Rule 45(b)(2)	8
III. Section 3051 of California Civil Code	
Provides a Special Lien	9
Certificate	

Table of Authorities

	Page
Statutes	
Section 3051, California Civil Code	9
Rules	
Rule 45(b)(1)	6
Rule 45(b)(2)	8
Treatise	
Witkin, California Procedure	10

NO. 22787

IN THE

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vs.

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APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

This action was commenced in the United States District Court for the Central District of California by the filing of a Praecipe for Issuance of Deposition Subpoenas in Case Not Originating in This District on January 3, 1968, by JOE W. VON BRIMER, The Senior Party in Patent Office Interference No. 95,373, pursuant to Title 35, Section 24, of the United States Code through which the Congress has provided The United States District Courts with subpoena power as to patent matters.

The Appellant, in *propris personum*, sought an Ex Parte Motion to Quash Subpoena Duces Tecum, filed January 16, 1968, and an Order Denying Motion to Quash Subpoena

Duces Tecum and Staying Compliance with said Subpoena for a Period of Ten Days was entered January 26, 1968 [Tr-31].¹

This Court has jurisdiction to review the final decision entered in the District Court pursuant to Section 1291, Title 28 of the United States Code.

A timely Notice of Appeal from said final decision [Tr-31] was filed on February 5, 1968 [Tr-34].

CONCISE STATEMENT OF THE CASE

The appellant, a registered patent agent, has performed services for and has incurred out-of-pocket expenses on behalf of the appellee, Joe W. Von Brimer. To date, \$3766.74 of the total amount due, namely \$4316.74 remains due. Approximately one half of the uncollected amount represents patent services rendered in direct connection with Interference No. 95,373 [Tr-2 et seq.].

At no time had the appellee, or his associates, ever objected to any one or more of the twenty-five (25) different debit notes which were submitted to him between January 1966 and September 1966 and which support this claim. On February 28, 1967, the claim for \$3766.74 was assigned to the Business Credit Corporation for collection and suit was brought in the Municipal Court of Los Angeles, Case No. 380,758 on March 16, 1967. So far, the appellee has successfully avoided service.

In January of this year, the appellee sought access to the files in appellant's possession. Such access was conditioned upon the appellee's remitting moneys due. Instead of paying, the appellee obtained the instant Subpoena Duces Tecum whereupon the Ex Parte Motion to Quash or Modify was filed pursuant to Rule 45(b)(1)&(2) for reasons that the deposition would compromise the claim assigned and therefore was unreasonable and oppressive and that the leverage encouraging payment by virtue of the possessory lien under Section 3051

1. Throughout this brief, reference to the Clerk's Transcript will be designated "Tr", and reference to the Reporter's Transcript of Proceedings of January 5 and January 17th, 1968, as "R1" and "R2" respectively.

of the California Civil Code would be destroyed.

The District Court, although well aware of the equities involved [R1-18, at lines 6-11; R2-4, at lines 14-22; R2-8, at lines 5-25; R2-9, at lines 17-25; R2-10, at lines 6-13 and 16-25; R2-14, at lines 1-11] and even questioning why the appellee has not put up a bond [R1-18 at line 2] to take care of the claim for \$3766.74 asserted against him by the appellant, – denied the relief sought and granted a ten-day stay pursuant to Rule 62(a) [Tr-31] noting that the Court’s decision is like a final order as far as the appellant is concerned [R2-14, at line 6] since the value of the asserted lien is gone once the deposition is taken [R2-10, at line 16 et seq.].

The questions involved concern the nature of protection to be afforded under Rule 45(b)(1) and to what extent the Federal Courts would permit discovery powers to be abused, especially in those instances where the documents sought by way of subpoena duces tecum could be equitably obtained by tendering payments for the patent services rendered and to which no objections as to billing had ever been made. This question was raised by the Memorandum in Support of Motion to Quash or Modify Subpoena Duces Tecum [Tr-6].

Another question relates to Rule 45(b)(2) regarding the advancement of reasonable costs of producing the books, papers, documents, etc. and was also raised as Point II in the last mentioned memorandum [Tr-7].

The third question pertains to the existence of a possessory lien in accordance with California Civil Code, Section 3051 which states clearly that

“ . . . [E]very person who . . . renders any service
has a special lien, etc. . . . ”(Emphasis added).

This question is raised as Point III in the aforesaid memorandum [Tr-8].

SPECIFICATION OF ERRORS

I

The District Court, by not quashing or modifying the subpoena duces tecum for reasons that same was unreasonable and oppressive pursuant to Rule 45(b)(1), has abused its

discretion with the ultimate result that an injustice will be perpetuated unless the order entered denying the Ex Parte Motion to Quash or Modify Subpoena Duces Tecum is vacated.

II

The District Court, in not conditioning denial of the Ex Parte Motion to Quash or Modify Subpoena Duces Tecum to the extent that the appellee do equity and tender payment to the Court for money due appellant for past patent services rendered (over which no objections were ever made), has abused its discretion in permitting one, a debtor, with unclean hands to assert the subpoena powers of the Court against another, his creditor, who has offered to deliver all upon payment of the debt and in so doing the District Court is helping a debtor avoid his debts.

III

The District Court, in not conditioning denial of the Ex Parte Motion to Quash or Modify Subpoena Duces Tecum to the extent that the appellee must put up a bond to take care of the claim for moneys due and/or agree to appear in Municipal Court of Los Angeles, in Case No. 380,758, both of which the District Court had judicially noticed and had commented on accordingly, likewise has abused its discretion to the end that the appellant shall be irreparably damaged unless the decision of the District Court be modified to require the appellee to post said bond and/or agree to receive service in the Municipal Court suit.

IV

The District Court, in construing Section 3051, California Civil Code, relating to possessory liens, has committed reversible error in ruling that the appellant has no possessory lien notwithstanding Section 3051 which clearly states that every person lawfully in possession of an article of personal property and rendering a service to the owner has such a special lien thereon, which ruling is contrary to the provisions of California Civil Code, Sections 13 and 14 relating to construction.

SUMMARY OF ARGUMENT

The District Court should jealously screen all instances where its discovery powers are sought. If alternatives are available which would produce the same or equal results the Court should be so advised. If the party seeking the aid of the Court does not have clean hands, — as here, being a debtor trying to obtain documents through the subpoena duces tecum approach, which documents the party against whom the discovery power is to be asserted has offered to deliver in toto upon payment of the uncontested amount — then the Court should exercise increased caution and carefully weigh the equities involved. Should a balance not be struck, however slight and for whatever reason, the reviewing body should unhesitatingly right the wrong.

In the instant case, the District Court could, and should, have normalized the inequities present by requiring the debtor/appellee to post a bond and/or to cease avoiding service in the Municipal Court case else the creditor/appellant's Ex Parte Motion to Quash or Modify The Subpoena Duces Tecum shall be granted. That such conditions could balance the equities involved and were before the District Court is evidenced by their source being the Court itself.

Instead the District Court became engrossed with appellant's alternative Point III [Tr-8] relating to the possessory lien theory, to which counsel for appellee so persistently alluded in his effort to overshadow the equities, or lack of them, which faced his client. The existence of a possessory lien is abundantly clear, Section 3051 reciting "has" and not "may have". That the claim has been assigned only complicates the matter in that appellee now serves also as trustee charged with the safekeeping of the documents. But whether the appellant has or has not a possessory lien, the taking of his deposition serves only to compromise his assignment for collection purposes and to destroy whatever leverage to compel payment of an uncontested money obligation he has, both of which perpetuate an injustice as to him who has done no wrong by one who has repeatedly promised to pay and has successfully avoided service since suit was filed in Municipal Court on March 16, 1967, Case No. 380,758.

I. Rule 45(b)(1) provides for protective relief against unreasonable and oppressive

subpoenas.

“... the court, upon motion made promptly ... may (1) quash or modify the subpoena if it is unreasonable and oppressive ...”. Rule 45(b)(1), Federal Rules of Civil Procedure.

An exhaustive search of the case law has failed to reveal pertinent case law. But, it is respectfully submitted, the absence of such authority should be of no consequence. The inequities in the case nevertheless still persist; moreover, the unfairness of permitting one to avoid his debts through the exercise of the discovery process would seem to compound the inequities. How often, could we say, that even those with the best of intentions stray unintentionally outside the limits whereupon discovery becomes a weapon and not a tool? But to let one, who benefited from services rendered, who never protested as to the fees charged, who promised repeatedly but has yet to pay, and who has successfully avoided service in a suit brought for money due, – to let such a party be the recipient of the District Court’s aid is, it is respectfully submitted, unreasonable and oppressive in every sense of the meaning and within the purview of the Rule 45(b)(1).

The District Court stated at the hearing held on January 5, 1968,

“Well, why doesn’t he [the appellee] put up a bond then to take care of the claim that Mr. Everett asserts, and await the Court’s resolution of the claim for compensation. *I mean, he is not playing fair with Mr. Everett either.* If this is a matter of balancing equities, if it has any equitable significance, why then I think that this is a significance. In fact, I don’t think you want to take his deposition. I think you want the documents. I don’t think whether you get his deposition or not makes – –”(Emphasis added) [R1-18, commencing at line 5].

Whereupon, Mr. Wallen, counsel for Mr. Von Birmer, again interrupted the Court for the third time. ²

That the District Court had noted the inequities in this matter cannot be disputed. But the order entered totally disregards the inequities present and is tantamount to doing nothing to right the wrong. Truly such an order constitutes an abuse of discretion, the correction of which is within the power of this reviewing body.

At the hearing held on January 17, 1968, the District Court also stated:

“ . . . but I [The Court] don’t have to help somebody avoid his debts and make it easier for him [the appellee]. Mr Everett is very sincere about this, so the statements made that the Municipal Court is going to protect him, that’s just a figment of our imagination if the defendant avoids service. I mean, if he would appear in the Municipal Court action and submit himself to having that Court adjudicate it, why then there is a reality to it. Otherwise there is no.” [R2-4, commencing on line 15]

The Court also stated at the second hearing:

“ . . . and [if] I don’t give him [Mr. Everett] a stay on my order, then of course his appeal is for nothing. *In other words, if you once take the deposition and look at the documents and compare them with your copies, there is nothing left. He has nothing left.*

As I say, I think I will be contributing to injustice if I didn’t grant him a stay on that. Now, that’s on the merits.

On the other hand, you argue, and I only point out by way of passing, that the Municipal Court is going to protect Mr. Everett. *But it is not.* (Emphasis added) [R2-8, commencing at line 15].

It is submitted that the District Court was sufficiently apprised of the facts herein, had

2. It may be of interest to note that at the hearings of January 5 and 17 respectively opposing counsel comments required 287 and 88 lines in the Reporter’s Transcript whereas the Court required 150 and 181 lines and Mr. Everett only 82 and 24 lines respectively.

failed only in not doing enough and therein abused its discretion. In not wishing to perpetuate an injustice, the District Court should have either granted the Ex Parte Motion or, in the alternative, conditioned its denial by requiring the appellee to post a bond and/or accept service and submit himself to the jurisdiction of the Municipal Court.

The District Court also said:

“Now, Mr. Everett has pointed out in his statement that he has been advised at least the V B Corporation, whatever it is, has been dissolved and doesn’t exist any more. That is the easy way of getting out of it, too. Or that assets have been purchased, but the debts didn’t go along with the purchase.”
[R2-9, lines 23 et seq.]

It should be noted that the appellee was not responsive when the Court commented above. Instead, they quickly chose to remain silent and not admit or deny and instead turned their attentions to the ten-day stay topic and be content with that. Such conduct may be applauded as good advocacy but it certainly cannot be said to truly serve the ends of justice.

II Rule 45(b)(2) provides for protective relief requiring the person on whose behalf the subpoena is issued to pay for the reasonable cost of producing the books, paper, and documents.

The appellee has offered to pay \$140.00 saying:

“ . . . We offered to pay Mr. Everett. We offered to pay him \$140.00 in collecting this packet of documents to deliver to us.” [R2-22, at lines 7-8].

In the interest of justice, the District Court should have incorporated at least this offered amount in its order denying the motion. The amount, it is true, is trivial when compared to the debt this appellee owes the appellant. But, it would appear to be better than nothing.

III Section 3051 California Civil Code sets forth provisions wherein a special possessory lien is established to protect those who render any service to the owner thereof for the compensation which is due from the owner for such personal property.

The applicable statute Section 3051 of the California Civil Code recites:

“Every person who, while lawfully in possession of an article of personal property renders any service to the owner thereof, by labor or skill, employed for the protection, improvement, safekeeping, or carriage thereof, *has a special lien thereon, dependent on possession, for the compensation, of any, which is due to him from the owner for such service;*” (There follows a numerous listing of specific classes of proprietors, all of which were subsequently added by way of ammendment. [See Tr-15 at lines 8 to 13]). (Emphasis added)

Opposing council has directed his opposition solely to the existence, or not, of a lien, perhaps for reasons that he recognizes the inequities present and concludes that it is better to say nothing and then maybe they will just go away. In this regard, the Court’s attention is also directed to the appellee’s Motion In Opposition to Ex Parte Motion to Quash Subpoena Duces Tecum [Tr-2] and to the fact that the caption makes no mention of “Or Modify” as does the appellant’s memorandum [Tr-2].

It appears, after an exhaustive search, that no judicial body has had the opportunity to construe Section 3051 of the California Civil Code in a situation analgous to what exists here. But, the absence of a precedent should not restrict a court of competent jurisdiction from dispensing justice. In the instant case, justice can be severed by striking a proper balance of the equities involved without deciding whether or not the California statute does in fact establish a special possessory lien to protect patent agents from compromising their claim or the assignments of such claims for collection.

In another aspect, opposing counsel, in assuming arguendo that a special lien is created, advocates that such a lien should be analogous to an attorney’s lien in scope. But, as opposing counsel has pointed out [Tr-16, at lines 19-25], there is no attorney’s lien in California.

Concerning attorney's lien, a noted authority on California law has written that two kinds of attorney's liens to secure expenses and fees are recognized in most jurisdictions: (1) a general retaining (possessory) lien on papers and personal property of the client coming into the attorney's possession and (2) a specific charging (nonpossessory) lien or equitable right to satisfy his expenses and fees out of the judgment recovered. To quote Professor Witkin:

“Our courts have refused to recognize either, and have declared in a number of cases that the attorney's sole remedy is in an action at law against his client. (See *Wagner v. Serioti* (1943) 56 C. A. 2d. 693, 697, 133 P. 2d. 430.) The California rule is perhaps the result of a mistaken view of the common law taken in *Ex Parte Kyle* 1 C. 331 (see Cal. L. Rev. 594). And in any event, . . . there is no public policy objection to such security; an attorney's lien does not automatically come into existence in the ordinary case, but it does have statutory recognition in a few special situations, and can be freely created by express contract.” 1 Witkin, California Procedures, Page 30, (1954).

In his 1965 Supplement, Professor Witkin writes:

“California may soon join the majority of states in recognizing the attorney's charging lien. (See *Isrin v. Superior Court* (1965) . . . 45 C. R. 320, 403 P. 2d. 728, *Actions*, Supp., [Section] 83 A [dictum: “it is problematical whether much vitality remains in the *Kyle* rule].) Supplement, Witkin, California Procedure, Page 16, (1965).

Whether or not the law will develop along the above lines as Professor Witkin points out would appear rather questionable in view of the number of controversies addressing themselves to this problem. But, a step in the proper direction, made by this Honorable Court, could well advance the cause along its way, especially in those cases where the equities are so strongly in favor of the party asserting the possessory lien and who needs the protection against abusive discovery proceedings as is the case here. It should also be

pointed out that a nonpossessory charging lien is of little value in those instances, again as here, where the debtor/client has avoided service thereby frustrating any attempt to obtain the necessary judgment from which his expenses and fees can be recovered.

Either the vacating of the District Court's Order entered January 26, 1968, or the modifying of said Order requiring the appellee to post a bond and to submit himself to the jurisdiction of the Municipal Court else the Order entered is vacated is respectfully requested.

Dated June 20, 1968, at Los Angeles, California.

William G. Everett
In Propriis Personum

CERTIFICATE OF CONFORMANCE

I hereby certify that I have examined the provisions of Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the above-tendered brief conforms to all of the requirements of said Rules 18, 19 and 39.

WILLIAM G. EVERETT

No. 22787

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM G. EVERETT,

Appellant,

vs.

JOE W. VON BRIMER,

Appellee.

APPELLEE'S BRIEF.

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WM. B. LUCK, CLERK

TOPICAL INDEX

	Page
I.	
Introduction	1
II.	
Statement of the Issues	1
III.	
Statement of the Case	2
A. Statement of Facts	3
IV.	
Argument	5
A. Mr. Everett, a Patent Agent, Has No Lien on Papers or Documents Furnished by His Client and Upon Which He Has Performed No Work	5
B. The District Court Did Not Abuse Its Dis- cretion in Denying Mr. Everett's Motion to Quash or Modify the Subpoena Duces Tecum Seeking Access to His Former Client's Own Records and Papers	8
V.	
Conclusion	10

TABLE OF AUTHORITIES CITED

Cases	Page
D. I. Operating Company v. United States, 321 F. 2d 586 (9th Cir. 1963)	3
Goodman v. United States, 369 F. 2d 166 (9th Cir. 1966)	9
Myra Foundation v. Harvey, 100 N.W. 2d 435, 76 A.L.R. 2d 1313 (N.D. S. Ct., 1959)	7
Sperry v. Florida, 373 U.S. 379, 10 L. Ed. 2d 428 (1963)	7
Rules	
Federal Rules of Civil Procedure	
Sec. 73(g) (Abrogated)	3
Statutes	
United States Code	
Title 28, Sec. 1291	3
Title 35, Sec. 24	2, 9
California Civil Code	
Sec. 3051	1, 4, 5, 6, 7, 10

No. 22787
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM G. EVERETT,

Appellant,

vs.

JOE W. VON BRIMER,

Appellee.

APPELLEE'S BRIEF.

I.
INTRODUCTION.

This is the brief of the appellee, Joe W. von Brimer, in answer to the brief of appellant William G. Everett. The appellant will be referred to herein, for brevity, as "Mr. Everett" and the appellee as "Mr. von Brimer." To conform with Mr. Everett's brief, the record in the proceedings will be designated by the symbols "Tr." and the reporter's transcripts of proceedings will be designated by the symbols "Reptr. 1" for the January 12 proceeding and "Reptr. 2" for the January 17 proceeding.

II.
STATEMENT OF THE ISSUES.

Does Mr. Everett, a patent agent, have a lien under Section 3051 of the California Civil Code, or on any other basis, to retain possession of documents furnished him by his former client and upon which he has performed no work?

Did the District Court abuse its discretion in denying Mr. Everett's motion to quash or modify the *subpoena duces tecum* seeking access to these documents furnished him by his former client?

III.

STATEMENT OF THE CASE.

This is an appeal from an order by the District Court [Tr., pp. 31-33] denying a motion, by Mr. Everett, to quash or modify a *subpoena duces tecum* and staying compliance with said subpoena for a period of ten days. The instant proceeding is ancillary to an interference proceeding in the United States Patent Office between Robert E. Lake, Junior Party, and Joe W. von Brimer, Senior Party, Interference No. 95,373 [Tr., pp. 12-14]. The *subpoena duces tecum* was duly issued by the District Court pursuant to 35 U.S.C. § 24 and was personally served on Mr. Everett [Tr., pp. 12-14].

An *ex parte* motion to quash or modify the *subpoena duces tecum* was brought by Mr. Everett and a hearing was had before the District Court on January 12, 1968 [Reptr. 1]. A further hearing was set for January 17, 1968, and a Memorandum in Opposition to Ex Parte Motion to Quash Subpoena Duces Tecum [Tr., pp. 12-22] was served and filed on January 16, 1968, and a Memorandum of Points and Authorities in Support of Motion to Quash or Modify Subpoena Duces Tecum [Tr., pp. 2-11] was served and filed on January 17, 1968. A hearing was had before the District Court on January 17, 1968 [Reptr. 2] and on January 26, 1968, the Order Denying Motion to Quash Subpoena Duces Tecum and Staying Compliance with said Subpoena for a Period of Ten Days [Tr., pp. 31-33]

was entered. The instant appeal, pursuant to 28 U.S.C. § 1291, is from this order.

While counsel for Mr. von Brimer were of the opinion in the Court below that the order was not appealable and so advised the District Court [Reptr. 2, p. 5, lines 7-8], further research has led to the conclusion that the order may be regarded as final and therefore this Court has jurisdiction under 28 U.S.C. § 1291 [*D. I. Operating Company v. United States*, 321 F. 2d 586 (CA 9, 1963)]. Although the notice of appeal [Tr., p. 34] was filed February 5, 1968, and the record and transcripts were transmitted without delay to the Clerk of the Ninth Circuit Court of Appeals, Mr. Everett failed to make timely payment of the Docket fee and the appeal was not docketed until May 3, 1968, long after the expiration of the forty-day period provided by Rule 73(g) of the Federal Rules of Civil Procedure then in effect. No bond on appeal has been filed by Mr. Everett.

A. Statement of Facts.

The following relevant facts brought out in the hearings before the District Court appear undisputed.

The documents were sought under the *subpoena duces tecum* to prove priority of invention in a Patent Office interference proceeding, No. 95,373 [Tr., pp. 13-14; Reptr. 1, p. 15, line 11, to p. 16, line 4]. The documents retained by Mr. Everett and in his possession are original records and papers furnished him on behalf of his client and upon which Mr. Everett has performed no work [Tr., pp. 13-14; Reptr. 1, p. 11, lines 5-11]. They were not furnished him primarily for safekeeping

but for use in preparing other documents such as patent applications [Reptr. 2, p. 3, line 24, to p. 4, line 8]. The *subpoena duces tecum* specifically excludes, in paragraph 4 of the categories of documents, papers or documents which would constitute the work product of Mr. Everett [Tr., p. 30].

Mr. Everett moved to quash or modify the *subpoena duces tecum*, claiming the right under Section 3051 of the California Civil Code to possession of the documents by reason of an obligation or debt owed to him for past services and expenses in obtaining patents and in the interference matter herein [Tr., pp. 2-3; Reptr. 1, p. 7, line 25, to p. 10, line 6]. Mr. Everett has assigned his claim to this alleged obligation to the Retail Credit Bureau of Los Angeles [Reptr. 1, p. 11, line 21, to p. 12, line 25.] The Retail Credit Bureau has brought suit in the Los Angeles Municipal Court, *Retail Credit Bureau of Los Angeles v. Joseph von Brimer et al.*, No. 380,758 [Reptr. 1, p. 12]. The Complaint in the Municipal Court action names three defendants individually and doing business as VB Research & Development Co. (two have been served), and a fourth individual defendant (who also has been served). Mr. Everett's charges and his bills for the alleged services (Appellant's Opening Brief, p. 6) were rendered to the VB Research & Development Co., which had the responsibility for payment of the bills [Reptr. 2, p. 9, lines 4-9].

IV.
ARGUMENT.

Mr. Everett has no right to retain possession of the documents under any theory of a lien in California, nor does he have any right to retain the documents on any equitable basis, particularly where he has assigned the account to a collection agency which is proceeding by legal means in an effort to collect the disputed debt allegedly owed him. The District Court did not abuse its discretion in denying Mr. Everett's motion to quash or modify the *subpoena duces tecum*, particularly where this served the public policy of providing the Patent Office with the evidence on which the determination of priority of invention might be made.

A. Mr. Everett, a Patent Agent, Has No Lien on Papers or Documents Furnished by His Client and Upon Which He Has Performed No Work.

Mr. Everett based his motion to quash or modify the *subpoena duces tecum* upon Section 3051 of the California Civil Code. Section 3051, however, does not apply to the documents in question herein and no analogous cases have been found wherein documents of this type were entitled to the protection afforded by this section. Section 3051 is entitled "Lien for services: Manufacture, alteration, or repair of property: What persons to have liens", and states in pertinent part:

"Every person, who while lawfully in possession of an article of personal property renders any service to the owner thereof, by labor or skill, em-

ployed for the *protection, improvement, safekeeping, or carriage* thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due to him from the owner for such service; a person who *makes, alters, or repairs* any article of personal property, at the request of the owner, or legal possessor of the property, has a lien on the same for his reasonable charges for the balance due for such work done and materials furnished, and may retain possession of the same until the charges are paid; . . .” (Emphasis supplied).

The remainder of Section 3051 refers to specific classes of proprietors which have been added to the statute by amendments since the enactment of the section in 1872: *i.e.*, livery or boarding or feed stable or feed yard proprietors; foundry proprietors; laundry proprietors; veterinary proprietors; keepers of garages for automobiles; and keepers of trailer parks.

As the District Court pointed out, there was no showing or contention by Mr. Everett that the papers were supplied him for “protection” or “safekeeping” [Reptr. 2, p. 3, line 24, to p. 4, line 8]. Since it is also apparent that Mr. Everett, while possessing the documents, was not employed for the “improvement” or “carriage thereof”, and did not “make, alter, or repair any article of personal property”, Section 3051 is not applicable by its specific language to this situation. No case has been found interpreting Section 3051 to provide a lien in this type of situation where a patent agent, or any other professional man, has been furnished documents by his client for use in preparing other docu-

ments. Rather, the cases interpreting Section 3051 indicate that it is a different type of service which is covered by the section, *e.g.*, repairs, fruit processing, harvesting, storage and transportation, towing, manufacture, or other labor on personal property.

The Supreme Court of the United States has indicated that the services performed by a patent agent of the character rendered by Mr. Everett in this case are a form of quasi-legal work which may constitute the practice of law. *Sperry v. Florida*, 373 U.S. 379, 10 L.Ed. 2d 428 (1963). Any right of lien or other protection afforded Mr. Everett in this situation might therefore be commensurate with that of an attorney. However, there is no possessory lien accorded an attorney in the State of California respecting documents which belong to and were furnished by the client and which are not the attorney's work product. Similarly, were the services of a patent agent to be deemed analogous to those of an accountant, who may engage in quasi-legal work, no possessory lien would be recognized. See *Myra Foundation v. Harvey*, 100 N. W. 2d 435, 76 A.L.R. 2d 1313 (N.D. S.Ct., 1959) involving the interpretation of a lien statute in North Dakota similar to section 3051 of the California Civil Code.

Neither an accountant nor an attorney may claim a lien, in California, on original documents or records supplied by his client. By analogy, Mr. Everett could not be entitled to such a lien, whether his services were legal or quasi-legal in nature. Therefore, Mr. Everett is not entitled to a possessory lien in this situation under Section 3051 of the California Civil Code or on any other basis.

V.

CONCLUSION.

Mr. Everett, a patent agent, is not entitled to a lien under Section 3051 of the California Civil Code or on any other basis to retain possession of documents furnished him by his former client and on which he has performed no work. The District Court did not abuse its discretion in denying Mr. Everett's motion to quash or modify the subpoena duces tecum seeking access to these records and documents furnished by his former client. Mr. Everett has elected to proceed by court action and will be afforded all of the protection to which he is entitled by the Municipal Court. He has failed to prove that the subpoena in this instance is unreasonable and oppressive or that there exists for him any supervening right which would override the public policy of providing the Patent Office with the means of bringing facts into evidence.

Accordingly, the order by the District Court denying the motion to quash the *subpoena duces tecum* should be affirmed and Mr. Everett should be ordered to appear upon a renoticing of his deposition and to produce the documents in accordance with the *subpoena duces tecum*.

Respectfully submitted,

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THOMAS M. DEFOREST,

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Attorneys for Appellee.

No. 22788

JUN 24 1968

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22788

WHITE CHEMICAL COMPANY, Appellant,

v.

HENRY MORADIAN, RECEIVER in Bankruptcy
of CAL-ZONA FARMS, a Corporation, and
Henry Moradian, Trustee in Bankruptcy,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

APPELLANT'S OPENING BRIEF

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I N D E X

	<u>Page</u>
Table of Cases and Authorities.	ii
Statement of Pleadings and Facts Disclosing Basis of Jurisdiction.	1
Statement of the Case	2
Specifications of Error	6
Argument.	11
Certificate of Counsel.	22
Affidavit of Service by Mail.	22

TABLE OF CASES AND AUTHORITIES

<u>Cases</u>	<u>Page</u>
Columbia Ribbon Co., In re, 117 F.2d 999 (3d Cir. 1941).	13
Delaware Hosiery Mills, Inc., In re, 202 F.2d 951 (3d Cir. 1953).	16,19
Home Indemnity Co. v. Donovan Painting Co., Inc., 325 F.2d 870 (8th Cir. 1963)	15,19
Miller v. Sulmeyer, 299 F.2d 102 (9th Cir. 1962)	17,19
Nicholas v. United States, 384 U.S. 678, 86 S. Ct. 1674 (1966).	18,21
A. M. Townson & Co., In the Matter of, 283 F.2d 449 (3d Cir. 1960).	17,18
 <u>Statutes</u>	
11 U.S.C. § 104(a).	14
11 U.S.C. § 104(a)1	12,20
11 U.S.C. § 744	12,20
 Bankruptcy Act,	
§ 64(a).	14
§ 64(a)1	12,15,19
§ 344.	12,20

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22788

APPELLANT'S OPENING BRIEF

STATEMENT OF PLEADINGS AND FACTS
DISCLOSING BASIS OF JURISDICTION

The United States District Court for the District of Arizona had jurisdiction over this case by reason of it being a bankruptcy proceeding, and in particular, under 11 U.S.C. § 11(a)10. This was by reason of a Petition for review of Findings of Fact, Conclusions of Law and Order made, found and entered by the Referee in Bankruptcy in the matter of Cal-Zona Farms, a corporation, Bankrupt, which was bankruptcy proceeding No. B-11511-Phx. in the United States District Court for the District of Arizona.

Jurisdiction over this appeal is vested in the Court of Appeals of the United States and in the Ninth Circuit thereof by virtue of 11 U.S.C. § 47.

The order of the Referee in Bankruptcy is set forth in the Transcript of Record, beginning at page 139,

through and including page 149. The order of the United States District Court, issued on the Petition for Review, is set forth in the Transcript of Record beginning at page 196 through page 204. The Petition for Review is set forth in the Transcript of Record beginning at page 150.

STATEMENT OF THE CASE

On July 16, 1964, Cal-zona Farms, a corporation, the bankrupt herein, filed, in the United States District Court for the District of Arizona, a petition proposing an arrangement under Chapter XI of the Bankruptcy Act of the United States (Transcript of Record, page 4).

On October 26, 1964, the Receiver in the Chapter XI proceedings issued a Certificate of Indebtedness to Southwest Forest Industries, Inc., pursuant to an order of the Referee in Bankruptcy (Transcript of Record, pages 141-42). Such Certificate of Indebtedness was authorized to be issued with precedence and priority over the expenses of administration.

On August 20, 1964, the Receiver issued a Certificate of Indebtedness to Producers Cotton Oil of Arizona, on the condition that such certificate should have

precedence and priority over the expenses of administration (Transcript of Record, page 143).

There is still due and owing to Southwest Forest Industries, Inc., which is still the owner and holder of the above described Certificate of Indebtedness, the sum of \$50,000 (Transcript of Record, page 142).

There is still due and owing to Producers Cotton Oil Company, successor to Producers Cotton Oil of Arizona, under the above described Certificate, the sum of \$16,777.84 (Transcript of Record, page 143).

The appellant, White Chemical Company, a corporation, delivered to the debtor corporation, and now bankrupt, Cal-Zona Farms, goods and services employed by the Receiver in the growing of a crop, which said goods and services had a reasonable value of \$28,451.28. No Certificate of Indebtedness was issued to White Chemical Company, and all goods and services were delivered during the pendency of the proposed arrangement under Chapter XI, and were delivered at the instance and request of the Receiver for the purpose of aiding in growing of an existent crop. There is now due and owing to White Chemical Company the sum of \$28,451.28 (Transcript of Record, pages 143-44).

The Referee concluded as a matter of law that Southwest Forest Industries, Inc., had a Certificate of Indebtedness validly issued under § 344 of the Act relating to bankruptcy (11 U.S.C. § 744) and concluded further that Southwest Forest Industries, Inc., is entitled to priority in payment over other expenses of administration of the proposed arrangement under Chapter XI, subject only to the payment of fees and costs incurred in the administration of the ensuing bankruptcy, and that there is due and owing to Southwest Forest Industries, Inc., \$50,000 under the Certificate (Transcript of Record, page 146).

The Referee further concluded as a matter of law that Producers Cotton Oil Company was validly issued a Certificate of Indebtedness under § 344 of the Act relating to bankruptcy (11 U.S.C. § 744) and that it is entitled to priority in payment over the other expenses of administration of the proposed arrangement under Chapter XI, subject only to the payment of fees and costs incurred in the administration of the ensuing bankruptcy, and that the amount due and payable to Producers Cotton Oil Company is the sum of \$16,777.84 (Transcript of Record, page 147).

The Referee further concluded that the claim of White Chemical Company in the sum of \$28,451.28 is allowable as a cost of administration of the Chapter XI proceedings which was superseded by the bankruptcy (Transcript of Record, page 147).

The court, acting through the Referee, further concluded that in its discretion the claimants of administrative expenses are not entitled to equitable relief so that they, including appellant White Chemical Company, may participate on an equal basis with the holders of the Receiver's Certificates of Indebtedness in the distribution of the funds of the estate, and that they, including appellant White Chemical Company, are entitled to participate in the distribution of the assets of the estate, only after payment in full of the fees and expenses to the Trustee, Receiver, their attorneys and accountant, and after the payment in full of the amount due on the Receiver's Certificates of Indebtedness (Transcript of Record, pages 147-48).

There are inadequate funds to pay the Trustee, the Receiver, their attorneys and accountant, the Certificates of Indebtedness and the other costs of administration, including appellant.

SPECIFICATIONS OF ERROR

Specified Error No. 1

The Bankruptcy Court below was in error in Conclusion of Law No. 1 (Transcript of Record, page 145) since it did not distinguish between costs of administration in the Chapter XI arrangement proceedings and the ensuing bankruptcy proceedings and allowed the Receiver's fees and expenses and fees and expenses of the attorney for the Receiver, both in the Chapter XI proceedings, to be on a parity with the fees and expenses of the Trustee, attorney for Trustee, attorney for bankrupt and accountant, in the ensuing bankruptcy proceedings, for the reason that § 64(a)1 of the Bankruptcy Act, as amended [11 U.S.C. § 104(a)1], places all costs of administration on a parity except that costs of administration of an ensuing bankruptcy proceeding shall have priority in advance of payment of unpaid costs and expenses of administration incurred in the superseded Chapter proceeding.

Specified Error No. 2

The Bankruptcy Court below was in error in Conclusion of Law No. 3 (Transcript of Record, page 146)

for the reason that the court concluded that the certificate holder, Southwest Forest Industries, Inc., is entitled to priority in payment of its Certificate of Indebtedness for a loan representing expenses incurred in administration of the proposed arrangement under Chapter XI of the Bankruptcy Act, as amended, for the reason that § 64(a)1 of the Bankruptcy Act, as amended [11 U.S.C. § 104(a)1], places all costs of administration on a parity except that costs of administration of an ensuing bankruptcy proceeding shall have priority in advance of payment of unpaid costs and expenses of administration incurred in the superseded Chapter proceeding.

Specified Error No. 3

The Bankruptcy Court below was in error in Conclusion of Law No. 4 (Transcript of Record, page 147) for the reason that the court concluded that the certificate holder, Producers Cotton Oil Company, is entitled to priority in payment of its Certificate of Indebtedness for a loan representing expenses incurred in administration of the proposed arrangement under Chapter XI of the Bankruptcy Act, as amended, for the reason that § 64(a)1 of the Bankruptcy Act, as amended [11 U.S.C.

§ 104(a)1], places all costs of administration on a parity except that costs of administration of an ensuing bankruptcy proceeding shall have priority in advance of payment of unpaid costs and expenses of administration incurred in the superseded Chapter proceeding.

Specified Error No. 4

The Bankruptcy Court below was in error in Conclusion of Law No. 5 (Transcript of Record, page 147) since it limited pro rata distribution of the funds of the estate to Southwest Forest Industries, Inc., and Producers Cotton Oil Company, and did not include therein other costs of administration incurred and unpaid under the superseded Chapter XI proceedings, and did not distinguish between the fees and costs of Trustee, Receiver, attorneys and accountant between the superseded Chapter proceeding and the ensuing bankruptcy proceeding for the reason that § 64(a)1 of the Bankruptcy Act, as amended [11 U.S.C. § 104(a)1], places all costs of administration on a parity except that costs of administration of an ensuing bankruptcy proceeding shall have priority in advance of payment of

unpaid costs and expenses of administration incurred in the superseded Chapter proceeding.

Specified Error No. 5

The Bankruptcy Court below was in error in Conclusion of Law No. 7 (Transcript of Record, pages 147-48), since it did not permit the pro rata participation of the appellant and other claimants for costs of administration in the Chapter XI proceedings superseded by the ensuing bankruptcy proceedings on an equal basis with all other incurred and unpaid costs of administration of the superseded Chapter XI proceedings, including the holders of the Certificates of Indebtedness, for the reason that § 64(a)1 of the Bankruptcy Act, as amended [11 U.S.C. § 104(a)1] places all costs of administration on a parity except that costs of administration of an ensuing bankruptcy proceeding shall have priority in advance of payment of unpaid costs and expenses of administration incurred in the superseded Chapter proceeding.

Specified Error No. 6

The Bankruptcy Court below was in error in entering the order it entered based upon the Conclusions

of Law specified as error in the above set forth specifications of error, which said order is set forth in the Transcript of Record, pages 148 and 149, and that this is for the reasons set forth in the foregoing and preceding specified errors Nos. 1-5.

Specified Error No. 7

The Bankruptcy Court below was in error in establishing priority of payments in the Opinion and Order of the District Court on review, as the same are set forth in such Opinion and Order in the Transcript of Record, page 198, at line 5 through line 17, for the reason that such established order of priority is contrary to § 64(a)1 of the Bankruptcy Act, as amended [11 U.S.C. § 104(a)1], which places all costs of administration on a parity except that costs of administration of an ensuing bankruptcy proceeding shall have priority in advance of payment of unpaid costs and expenses of administration incurred in the superseded Chapter proceeding.

A R G U M E N T

A summary of the appellant's position can most concisely be set forth to be that the appellant claims that the Bankruptcy Court below was in error when it failed to provide for distribution of the balance of the assets of the bankrupt estate as follows. The costs of administration of the ensuing bankruptcy of Cal-Zona Farms, Inc., and in particular the Trustee's fees, the Trustee's attorney, the attorney's fees for the bankrupt's attorney, and the accountant's fees for the Trustee's accountant, are entitled to priority payment under the applicable statutory priority of payments since these are costs of administration of an ensuing bankruptcy after a superseded Chapter proceeding.

After the payment of the costs of administration of the ensuing bankruptcy, it is the position of the appellant that at that point all incurred and unpaid costs of administration of the superseded Chapter XI proceedings are on a parity and should share pro rata in the balance of the funds available for distribution towards the costs of administration of such superseded Chapter proceeding. This is for the reason that it is submitted that the Bankruptcy Court below has no authority,

either by statute or by equitable principles, to establish sub-priorities within a congressionally established priority, as is set forth in § 64(a)1, 11 U.S.C. § 104(a)1.

There is no question of the authority of the Bankruptcy Court to authorize the issuance of Certificates of Indebtedness in the course of a Chapter XI bankruptcy arrangement proceeding. Section 344 (11 U.S.C. § 744) provides as follows:

"During the pendency of a proceeding for an arrangement, or after the confirmation of the arrangement where the court has retained jurisdiction, the court may upon cause shown authorize the receiver or trustee, or the debtor in possession, to issue certificates of indebtedness for cash, property, or other consideration approved by the court, upon such terms and conditions and with such security and *PRIORITY IN PAYMENT OVER EXISTING OBLIGATIONS AS IN THE PARTICULAR CASE MAY BE EQUITABLE.*" (Emphases added)

The above emphasized language of the statute seems absolutely clear to the effect that the equities to be considered are only to be considered in establishing a priority of the Certificates of Indebtedness over existing obligations. It is respectfully submitted that under no reasonable interpretation of the statutory language is there authority to establish a priority for

the certificate holder over another class of claimant whose priority has been established by Congress.

In the case of *In re Columbia Ribbon Co.*, 117 F.2d 999 (3d Cir. 1941), in interpreting § 64, §§ a [11 U.S.C. § 104(a)], as amended, which has been amended on approximately five occasions since that date for purposes which do not appear to the appellant to be destructive of the language of the Third Circuit in that case, other than as hereinafter set forth, it was stated at 1001

" It follows that the Court in determining the priority of claims against the estate is bound by the provisions of Section 64, sub. a, as amended, 11 U.S.C.A. § 104, sub. a, which specify the classes of debts which are to have priority of payment over general creditors of a bankrupt estate and the order of their payment with respect to each other. Five classes of debts having priority are established. The first class includes 'the costs and expenses of administration.' *SINCE CONGRESS HAS SET UP NO ORDER OF PRIORITY WITHIN THE FIRST CLASS THE COURT MAY NOT FIX PRIORITIES WITHIN THE CLASS.* *Missouri v. Ross*, 299 U.S. 72, 57 S.Ct. 60, 81 L.Ed. 46; *Missouri v. Earhart*, 8 Cir., 111 F.2d 992, certiorari denied 61 S.Ct. 43, 85 L.Ed. . . . *CONSEQUENTLY ALL ADMINISTRATION EXPENSES, WHETHER INCURRED DURING THE REORGANIZATION PERIOD OR DURING THE LIQUIDATION PERIOD AND WHETHER FOR COSTS AND EXPENSES OR FOR SERVICES, MUST SHARE PRO RATA IN THE FUNDS AVAILABLE FOR PAYMENT.*" (Emphases added)

The Court further states in that case at page 1002

" It is well settled, as the Circuit Court of Appeals for the Fourth Circuit pointed out in *Westall v. Avery*, 171 F. 626, 628, 'that bankruptcy proceedings themselves are purely equitable in their character, and, within the limits prescribed by the Bankruptcy Act [11 U.S.C.A. § 1 et seq.] and the special rules of practice prescribed by the Supreme Court, are to be administered in accord with the general principles and practices of equity.' See *Local Loan Co. v. Hunt*, 292 U.S. 234, 54 S.Ct. 695, 78 L.Ed. 1230, 93 A.L.R. 195. But these equitable powers are to be exercised within the limits laid down by the Bankruptcy Act and subject to its specific provisions. In *re Concentrated Products Corp.*, 3 Cir., 38 F.2d 745. *THE COURT MAY NOT BY GRANTING A PRIORITY WHICH IT DEEMS EQUITABLE SET ASIDE THE CLEAR CONGRESSIONAL MANDATE THAT NO SUCH PRIORITY SHALL BE ACCORDED.*"

(Emphases added)

Section 64(a) of the Bankruptcy Act, as amended [11 U.S.C. § 104(a)], provides

"§ 104. Debts which have priority

(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the costs and expenses of administration, . . . Where an order is entered in a proceeding under any chapter of this title directing that bankruptcy be proceeded with, the costs and expenses of administration incurred in the ensuing bankruptcy proceeding shall have priority in advance of

payment of the unpaid costs and expenses of administration, including the allowances provided for in such chapter, incurred in the superseded proceeding and in the suspended bankruptcy proceeding, if any;"

As is evident, Congress has now established a sub-priority within subsection a(1) of § 64. By Congress having given priority to costs of administration of an ensuing bankruptcy after a terminated chapter proceeding, it is quite evident that Congress has intended this and this alone as the only priority among the various costs of administration that are incurred in the course of bankruptcy proceedings. It is therefore submitted that the *Columbia Ribbon Co.* case, *supra*, is still good law except as modified by Congress.

The Eighth Circuit had occasion to decide upon the establishment of sub-priorities within a congressionally established priority in the case of *Home Indemnity Co. v. Donovan Painting Co., Inc.*, 325 F.2d 870 (8th Cir. 1963). In that case the Eighth Circuit stated, at page 875

" To be sure, abundant authority can be found to support the proposition that a court cannot disregard the priority classifications established by statute and 'set up a subclassification of claims within a class given equal

priority by the Bankruptcy Act and fix an order of priority for the sub-classes according to its theory of equity.' In *Re Columbia Ribbon Co.*, 3 Cir., 117 F.2d 999, 1002 (1941). See also *Missouri v. Ross*, 299 U.S. 72, 57 S.Ct. 60, 81 L.Ed. 46 (1936); In *Re Delaware Hosiery Mills*, 3 Cir., 202 F.2d 951, 953 (1953); *Collier on Bankruptcy*, §§ 64.02(4); 64.401(2); 65.06, p. 2293 (14th ed. 1956). However, it is likewise true that the Act does not establish inexorable rules for distribution which can never be deviated from in the interest of justice and equity. *Goldie v. Cox*, 8 Cir., 130 F.2d 695, 699-700 (1942); *Bird & Sons Sales Corporation v. Tobin*, 8 Cir., 78 F.2d 371, 373-374, 100 A.L.R. 654 (1935); *Sampsell v. Imperial Paper Corp.*, 313 U.S. 215, 219, 61 S.Ct. 904, 85 L.Ed. 1293 (1941); *Pepper v. Litton*, 308 U.S. 295, 303-305, 60 S.Ct. 238, 84 L.Ed. 281 (1939); *Costello v. Fazio*, 9 Cir., 256 F.2d 903, 909-910 (1958); *Wheeling Valley Coal Corporation v. Mead*, 4 Cir., 171 F.2d 916, 920-921 (1949); *Bank of America Nat. Trust & Sav. Ass'n v. Erickson*, 9 Cir., 117 F.2d 796, 798 (1941); In *Re Aktiebolaget Krueger & Toll*, 2 Cir., 96 F.2d 768, 770 (1938). It should be pointed out that *most of these cases involve complete disallowance or subordination of a claim asserted by a creditor guilty of some fraudulent or at least questionable tactic*, whereas, here, the United States has a legitimate claim and is guilty of no such conduct."

(Emphasis added)

In the case of *In re Delaware Hosiery Mills, Inc.*, (Appeal of Northwestern Nat'l Bank in Philadelphia), 202 F.2d 951 (3d Cir. 1953), the Court stated at 953

". . . . Of course, it may be possible for the receivers' certificate or the authorization of the Court to provide terms for priority or subordination of the loan--generally provision is made either for parity with other expenses of administration or subordination to same.⁶ . . .

"fn 6. Research has not disclosed any case where there was a provision that the certificate or loan had priority over expenses of administration."

In the case of *In the Matter of A. M. Townson & Co., Bankrupt*, 283 F.2d 449 (3d Cir. 1960), Circuit Judge Kalodner, in a dissenting opinion stated at 461 of the opinion

". . . . Under Section 64, sub. a(1) of the Bankruptcy Act court-authorized loans made to receivers to finance their operations are in the category of 'the actual and necessary costs and expenses of preserving the estate' and are accorded first priority as an 'expense of administration'."

In the case of *Miller v. Sulmeyer*, 299 F.2d 102 (9th Cir. 1962), this Court, speaking through Circuit Judge Barnes, at that time stated at page 104

"[2] It is true that a bankruptcy court has the power to subordinate a claim which is tainted with fraud or other improper conduct when equitable principles dictate the claim should not be allowed to participate on a parity with those of other creditors. But here there is no fraud."

Finally, in what it is respectfully submitted is highly persuasive, if not controlling, upon the case at bar, is the case of *Nicholas v. United States*, 384 U.S. 678, 86 S. Ct. 1674 (1966), wherein Mr. Justice Stewart delivered the majority opinion of the Court, and the dissent appears to be as to an aspect of the case other than the one presented in this case; at page 691 of the U. S. Report and page 1683 of the Supreme Court Reporter, the Supreme Court stated

"We need not here determine whether, with regard to the *principal* of those taxes, the general language of §7501(a) overrides the strong policy of §64a(1) of the Bankruptcy Act, *WHICH ESTABLISHES A SHARPLY DEFINED PRIORITY THAT PLACES ALL EXPENSES OF ADMINISTRATION ON A PARITY*, including claims for taxes. Cf. *Guarantee Title and Trust Co. v. Title Guaranty & Surety Co.*, 224 U.S. 152, 32 S.Ct. 457, 56 L.Ed. 706; *Davis v. Pringle*, 268 U.S. 315, 45 S.Ct. 549, 69 L.Ed. 974; *Missouri v. Ross*, 299 U.S. 72, 57 S.Ct. 60, 81 L.Ed. 46."
(Emphases added)

It is respectfully submitted, in summary of the above set forth statutory authority and case law authority, that under the case of *In the Matter of A. M. Townson & Co., Bankrupt, supra*, the monies borrowed from Producers Cotton Oil Company and Southwest Forest Industries, Inc., are properly classified



as expenses of administration.

It is not conceded but, however, there may be some limited authority to the effect that when a creditor or claimant is guilty of some fraudulent or at least questionable tactic, or his conduct is tainted with fraud, that then the Bankruptcy Court in the application of equitable principles could subordinate that claim. *Home Indemnity Co. v. Donovan Painting Co., Inc.*, *supra*, and *Miller v. Sulmeyer*, *supra*. But as this very Circuit Court stated in *Miller v. Sulmeyer*, *supra*,

"But here there is no fraud."

The Court's attention is specifically directed to the footnote in the case of *In re Delaware Hosiery Mills, Inc.*, *supra*, where that Court indicated that research had disclosed no case where a certificate or loan had priority over expenses of administration.

In the case of *In re Columbia Ribbon Co.*, *supra*, the Court, without equivocation, stated that when Congress had established priorities, this manifested an intention to have no sub-priorities within those established by the congressional enactment.

The applicable law to the case at bar, § 64(a)1

of the Bankruptcy Act, as amended [11 U.S.C. § 104(a)1], has established one sub-priority, namely, the costs of administration of an ensuing bankruptcy proceeding which supersedes a Chapter proceeding, and then the priority is only to the extent that the costs of administration of the superseded Chapter proceeding have been incurred and are unpaid.

In the case at bar, the Certificates of Indebtedness, even though issued in the form that they were, cannot contravene the statute authorizing their issuance. Section 344 of the Bankruptcy Act, as amended (11 U.S.C. § 744), authorizes the issuance of the certificates

"upon such terms and conditions and with such security and *PRIORITY IN PAYMENT OVER EXISTING OBLIGATIONS* as in the particular case may be equitable."
(Emphases added)

It is submitted that the claim for costs of administration of the appellant, which was found by the court to be a cost of administration, Conclusion of Law No. 6 (Transcript of Record, page 147), must be treated on a parity with the Certificates of Indebtedness since all three claimants hold claims for costs of administration incurred in a superseded Chapter proceeding.

As the Supreme Court of the United States stated
in *Nicholas v. United States, supra*,

"Section 64a(1) of the Bankruptcy Act . .
. establishes a sharply defined priority
that places all expenses of administra-
tion on a parity, . . ."

By reason of the foregoing, it is respectfully
submitted that this case should be remanded to the
Bankruptcy Court below under direction that the costs
of administration of the ensuing bankruptcy proceeding
should first be paid and that thereafter the balance
of the bankrupt estate should be distributed pro rata
among all other validly existing claims for costs of
administration, incurred but not paid, in the super-
seded Chapter XI proceeding.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those Rules.

/s/ Joseph B. Miller

Joseph B. Miller

AFFIDAVIT OF SERVICE BY MAIL

JOSEPH B. MILLER, being duly sworn, says that he deposited three (3) copies of the foregoing Appellant's Opening Brief in final printed form in the United States Post Office in the City of Phoenix, State of Arizona, enclosed in envelopes duly addressed as follows:

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All mailings were made on the 20th day of June,
1968.

/s/ Joseph B. Miller

Joseph B. Miller

Subscribed and sworn to before me
this 20th day of June, 1968.

[SEAL]

/s/ Catherine F. Howard

Notary Public

My commission expires:
September 29, 1971

In the

United States Court of Appeals

For the Ninth Circuit

WHITE CHEMICAL COMPANY,

Appellant,

VS.

HENRY MORADIAN, RECEIVER IN BANKRUPTCY
OF CAL-ZONA FARMS, A CORPORATION, AND
HENRY MORADIAN, TRUSTEE IN BANKRUPT-
CY, ET AL,

Appellees.

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SUBJECT INDEX

	Page
Summary or Argument	1
Statement of Facts	2
Statement of Questions Presented	6
Argument	7
The District Court Properly Accorded the Receiver's Cer- tificates of Indebtedness Priority in Payment Over Other Expenses of Adiministration Incurred in the Chapter XI Proceeding	7
Conclusion	17

TABLE OF AUTHORITIES CITED

CASES	Pages
Home Indemnity Company v. F. H. Donovan Painting Co., 325 F.2d 870 (8th Cir. 1963).....	9, 10
In re A. M. Townson & Co., 283 F.2d 449 (3rd Cir. 1960).....	12
In re Bridgeford Co., 237 F.2d 182 (9th Cir. 1956).....	13
In re Columbia Ribbon Co., 117 F.2d 999 (3rd Cir. 1941).....	9, 12
In re Delaware Hosiery Mills, 202 F.2d 951 (3rd Cir. 1953)	10, 11, 13
In re Miracle Mart, Inc. (3rd Cir. June 3, 1968) C.C.H. Bankruptcy Reports ¶ 62,784 p. 72,388.....	15
Miller v. Sulmeyer, 299 F.2d 102 (9th Cir. 1962).....	11
Nicholas v. United States, 384 U.S. 678, 86 S. Ct. 1674 (1966)	14, 15

STATUTES

Bankruptcy Act:	
Section 64a(1)	1, 2, 5, 7, 8, 12, 13, 15
Section 64a(2)	9
Section 344	1, 4, 5, 6, 7, 13, 15, 16
Section 355	15
11 U.S.C. Section 701 et seq.....	2

TEXT

3, Collier, Bankruptcy ¶ 64.01 [3.2] p. 2058 (14th ed. 1967)....	13
--	----

In the
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WHITE CHEMICAL COMPANY,

Appellant,

VS.

HENRY MORADIAN, RECEIVER IN BANKRUPTCY
OF CAL-ZONA FARMS, A CORPORATION, AND
HENRY MORADIAN, TRUSTEE IN BANKRUPT-
CY, ET AL,

Appellees.

Brief for Appellees

SUMMARY OF ARGUMENT

The District Court properly held that Receiver's Certificates should be accorded priority over other costs of administration incurred in a Chapter XI proceeding where the Certificates were validly issued pursuant to Section 344 of the Bankruptcy Act and they expressly provided for such priority. The granting of such priority to Receiver's Certificates is authorized by Section 344. That Section creates an exception to the parity treatment of costs of administration provided for by Section 64 a (1) of the Bankruptcy Act just as an exception is created for the payment of the costs of administration for a superseding bank-

ruptcy. However, even if the priority treatment accorded the Receiver's Certificates was not expressly authorized by statute, the Bankruptcy Court has equitable power to accord such priority to the Certificates.

The policy of Section 64a is in part to promote effective and efficient administration of estates under the jurisdiction of the Bankruptcy Court. The District Court's holding that the priority expressly granted the Receiver's Certificates should be respected and given effect is consistent with this policy. Unless the recipients of Receiver's Certificates can be assured that the priority granted in the Certificates will be respected, the availability of capital will be severely restricted and the likelihood of achieving the goal of the proceeding will similarly be impaired.

STATEMENT OF FACTS

On July 16, 1964, the debtor, Cal-Zona Farms, a corporation, filed a petition proposing an arrangement under the provisions of Chapter XI of the Bankruptcy Act, 11 U.S.C. Section 701 et seq. (R. 4)¹

To obtain funds for the continuance of the debtor's business (R. 5), the Receiver filed, on or about July 28, 1964, his petition seeking authorization to issue to Producers Cotton Oil Company (hereinafter referred to as Producers), a Certificate of Indebtedness in the sum of \$30,000. (R. 4-6). This petition was approved on or about July 28, 1964 (R. 7-9). On or about August 21, 1964, the Referee, upon petition of the Receiver (R. 10-16), issued his amended order authorizing the issuance of this Receiver's Certificate (R. 17-23).

1. The record in this case consists of a volume of court filings. The court filings are numbered consecutively so that an item on page 100 will be cited "R. 100".

Both the original Order and Certificate and the Amended Order and Amended Certificate of Indebtedness provided:

. . . that the earnings, income, profits, property and estate of the . . . Debtor

were to be charged with the lien of the Certificate and that the Certificate was to have priority over the expenses of administration incurred therein (R. 8, 18 and 21). Based upon this priority position, Producers advanced new money to the Receiver to keep the debtor's business in operation, and there remains due, owing and unpaid thereon the sum of \$16,777.85 (R. 143).

To obtain additional funds for the continuance of the debtor's business (R. 25, 34) which the Receiver was unable to secure from any other source (R. 36), and following a meeting of creditors of the debtor on September 16, 1964, the Referee approved an agreement whereby the Receiver was authorized and directed to issue his Certificate to Southwest Forest Industries, Inc. (hereinafter referred to as Southwest) for Fifty Thousand Dollars (\$50,000) in exchange for a loan by Southwest in the same sum (R. 53-55). In that order, the Referee authorized and directed that the income and estate of the debtor be charged with the lien of the Certificate and the Certificate should have priority over the expenses of administration incurred therein (R. 54). Pursuant to that order, the Receiver issued his Certificate for Fifty Thousand Dollars (\$50,000) to Southwest on or about October 26, 1964 (R. 59-60). There remains due, owing and unpaid on said Certificate the sum of \$50,000 (R. 142).

The Referee, upon the hearing regarding payment of these Certificates, concluded that the Certificates issued to Southwest and to Producers were validly issued as pro-

vided in Section 344 of the Bankruptcy Act, 11 U.S.C. § 744 (R. 146-147).

Beginning on August 1, 1964, White Chemical Company (White) and Seeds, Inc. furnished goods and services to the debtor in the amount of \$28,451.28 and \$3,718.30, respectively (R. 61-62; 56-57). These goods and services were furnished at the request of the Receiver and were used by him in connection with the growing and harvesting of the 1964 fall lettuce crop. The Receiver did not issue a Certificate of Indebtedness to White or Seeds, Inc., nor was he authorized to do so by the Referee. All of these goods and services were furnished by White and Seeds, Inc. during the Chapter XI proceeding (R. 143-144). The goods and services furnished by White and Seeds, Inc. to the debtor did not materially benefit or enrich the debtor's estate or its creditors (R. 145).

On December 29, 1964, the Referee entered an order adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of the Bankruptcy Act (R. 110). The funds presently held by the trustee are comprised in toto of the proceeds of sale of assets of the bankrupt and the proceeds received by the trustee from the settlement of a civil action and a turnover order, and none of these funds represent any income from crops grown by the receiver or the trustee (R. 145).

On September 27, 1967, the Referee entered an order providing that the assets of the bankrupt's estate be distributed in the following order of priority:

1. Payment of the reasonable fees and expenses of the trustee, trustee's attorney, accountant, bankrupt's attorney, receiver and receiver's attorney.

2. Payment in full of the Certificate of Indebtedness held by Southwest and Producers Cotton Oil Company. If

sufficient funds were not available to pay such Certificates in full, then they were to participate in the available funds on a pro rata basis.

3. Payment of the claims of White and Seeds, Inc. as administrative expenses of the Chapter XI proceeding (R. 139-148).

On or about October 6, 1967, White filed its petition for review of the Referee's order in the United States District Court for the District of Arizona (R. 150-164). In its petition for review, White contended that the Referee's order was erroneous because it provided for priorities not authorized under Section 64a(1) of the Bankruptcy Act, 11 U.S.C. § 104(a)(1) (R. 169). White contended that all costs of administration of the Chapter XI proceeding must be treated on a parity in the distribution of the estate on a pro rata basis after the payment of the costs of administration of the superseding bankruptcy proceeding since all those costs are accorded a first priority status (R. 176).

The District Court, William P. Copple, District Judge, rejected this contention and, on January 30, 1968, entered its opinion and order holding that Section 344 of the Bankruptcy Act provides an exception to the general rule of parity distributions and allows for special treatment of receiver's Certificates of Indebtedness (R. 199-200). The Court held that the priority given the Certificates of Indebtedness was fully within the authority of the Referee under Section 344 but that the Referee erred in his final order of distribution in withdrawing the priority accorded to the Certificates and refusing to allow the Certificates their assigned priority (R. 200-201). The Court held that the proper order of priorities was as follows:

(1) The costs of administration of the superseding bankruptcy proceeding including those fees of the bankrupt's attorney allocable to the bankruptcy proceedings.

(2) Payment of the balance due on the Certificates of Indebtedness owned by Southwest and Producers and if there were insufficient funds in the hands of the trustee to pay in full the balances due, then the holders of such Certificates were to share pro rata in the distribution of funds.

(3) The remaining costs of administration in the Chapter XI proceedings (R. 203).

The District Court remanded the case to the Referee for further findings of fact with respect to the services, if any, rendered by the bankrupt's attorney in the superseding bankruptcy since the Referee's findings failed to distinguish between the fees and expenses of the bankrupt's attorney rendered in the bankruptcy proceeding and in the superseded Chapter XI proceeding (R. 203-204).

It is this opinion and order which the appellant is questioning by this appeal (R. 207).

Subsequently, the bankrupt's attorney, by affidavit, stated that he performed no services and made no claim for compensation for the performance of any services in connection with the bankruptcy proceeding (R. 205).

The appellant concedes that it is bound by the facts as set forth above and contained in the Referee's findings of fact since they are not clearly erroneous (R. 212).

STATEMENT OF QUESTION PRESENTED

Whether Receiver's Certificates of Indebtedness which expressly provide for payment prior to other costs of administration and are validly issued pursuant to Section 344 of the Bankruptcy Act are to be accorded such priority over other costs of administration incurred in a Chapter XI proceeding.

ARGUMENT**The District Court Properly Accorded the Receiver's Certificates of Indebtedness Priority in Payment Over Other Expenses of Administration Incurred in the Chapter XI Proceeding.**

As a preliminary matter, it should be noted that the question of the authority of the Referee under Section 64 a(1) of the Bankruptcy Act (11 U.S.C. § 104(a)(1)) to give priority to the costs of administration in the superseding bankruptcy proceedings over the costs of administration in the superseded Chapter XI proceedings is not in issue here (R. 207). This is especially significant since the cases cited by appellant are largely concerned with the relative priorities of costs of administration in a superseded Chapter XI proceeding and a superseding bankruptcy.

What is involved in this appeal is whether a Receiver's Certificate, validly issued under the provisions of Section 344 of the Bankruptcy Act (11 U.S.C. § 744) can include in its provisions a requirement that it be paid prior to the payment of any other costs of administration. It is the position of these appellees that such a provision is valid and when such a Certificate has been approved by the Referee upon the request of the Receiver and the attorney for the bankrupt, this priority is binding and the holders of these Certificates must be paid prior to payment of any other costs of administration of the superseded Chapter XI proceeding. To refuse to honor this priority after the holders of the Certificates rely thereon and advance new monies to the Receiver so that he can continue the business of the Debtor, would be to rewrite the agreement and, as a result, would seriously impair the use of such Certificates and could make any future Chapter XI proceedings doubtful as to their success.

Section 344 of the Bankruptcy Act (11 U.S.C. § 744) provides:

During the pendency of a proceeding for an arrangement . . . the court may upon cause shown authorize the receiver or trustee, or the debtor in possession, to issue certificates of indebtedness for cash, property or other consideration approved by the court, upon such terms and conditions and with such security and priority in payment over existing obligations as in the particular case may be equitable.

Appellees have been unable to find any authority which holds or suggests that this section does not mean what it says. It provides that the Referee may authorize the issuance of receiver's Certificates of Indebtedness on such terms and conditions and with such priority as in the particular case may be equitable. This is precisely what the Referee did in this case when he authorized the Certificates to be issued with priority over other costs and expenses of administration in the Chapter XI proceedings.

The appellant contends that the court was precluded from according the receiver's Certificate such priority by virtue of Section 64 a (1) of the Act (11 U.S.C. § 104(a) (1)). Section 64 a (1) provides that the costs and expenses of administration of a superseded Chapter XI proceeding shall be entitled to a first priority in payment in the distribution of bankrupt estates subject to the payment of the costs and expenses of administration incurred in a bankruptcy superseding the Chapter XI proceeding.

The appellant contends that since all costs of administration in the superseded proceeding are entitled to a first priority then the court is without authority to recognize and effect the express priority accorded a Receiver's Certificate in the superseded proceeding because that would in effect create a sub-priority which appellant contends is prohibited by the language of the statute (Appellant's Opening Brief at 11-12).

The appellant cites and quotes at length from *In re Columbia Ribbon Co.*, 117 F.2d 999 (3rd Cir. 1941) (Appellant's Opening Brief, p. 13). The appellant apparently relies upon that case for the proposition that the court may not under any circumstances grant a priority to one cost of administration in a superseded Chapter XI proceeding over other costs of administration incurred in the same proceeding. Although appellant asserts that that case is relevant to the instant case, the decision suggests, indeed compels, an opposite conclusion. In that case, the court was not concerned with the relative priorities of costs of administration in a superseded Chapter XI proceeding. To the contrary, the court was concerned with and considered the relative priorities as between costs of administration in a superseded Chapter X proceeding and costs in a superseding bankruptcy.

The appellant's reliance upon *Home Indemnity Company v. F. H. Donovan Painting Co.*, 325 F.2d 870 (8th Cir. 1963) is not well founded. In that case, the questions presented were whether sums paid as wages by the appellant surety between the date of contractual default by the bankrupt and the date of its bankruptcy constituted wages within the meaning of Section 64 a (2) of the Bankruptcy Act requiring allowance as a wage priority claim; and whether a wage priority claim allowed for wages due prior to the bankrupt's default was properly subordinated to the payment of a tax claim of the United States and the State of Texas. The court found that the wages paid after the bankrupt's default were not paid to its employees but rather to the employees of the surety company and accordingly they were not entitled to a wage claim priority. The court observed that under Section 64 wage claims were entitled to a second priority while tax claims were entitled to a fourth priority and that:

... by act of Congress, surety's \$17,974.25 claim would have priority were it not for the equitable power of a Federal Bankruptcy Court to subordinate claims of some creditors to those of others. According to controlling equitable principles, a surety may not share in a bankrupt's assets ahead of or on equal terms with any creditors who are members of the class the surety's bond had been given to protect. (citations omitted) Application of this rule to the claims before us necessitate subordination of surety's wage claim to the tax claim of the State of Texas and to that portion of the tax claim of the United States that arose in the course of the Ford Hood project.

325 F.2d 874, 875.

The *Donoran* case clearly did not involve the questions of priorities presented in the instant case. Accordingly, it does not govern the decision here. To the extent that it can be considered relevant to the question presented, it does not support the appellant's position since the court clearly recognized that "the act does not establish inexorable rules for distribution which can never be deviated from in the interests of justice and equity." 325 F.2d at 876.

Similarly, in *In re Delaware Hosiery Mills*, 202 F.2d 951 (3rd Cir. 1953) the Court did not consider the respective priorities of Receiver's Certificates and other costs of administration in a Chapter XI proceeding. Receiver's Certificates were not even involved in that case. That alone would distinguish the *In re Delaware* case. However, it is difficult to understand in what way that case supports the petitioner's contentions, especially in view of the court's comments:

Of course, it may be possible for the receivers' Certificate on the authorization of the court to provide terms for priority or subordination of the loan—gen-

erally provision is made either for parity with other expenses of administration or subordination to same.

There was no express provision in the authorization given by the District Court in the instant case as to the order of priority of the borrowed money with respect to the other costs of administration and we will not construe the language of the decree as giving the creditor any such priority.

202 F.2d at 953

The above quoted portion of the court's opinion amply demonstrates that the "Certificates" simply did not provide for priority as they did in the instant case. Had they done so, the court's opinion suggests that such a priority would have been respected. Accordingly, that case does not support the appellant's assertions but rather it strongly suggests a position contrary to that of the appellant's.

Similarly, *Miller v. Sulmeyer*, 299 F.2d 102 (9th Cir. 1962) did not involve the question of the priorities presented in the instant case. In that case, a mortgage was partially invalid under state law because of delay in recordation and the mortgagees contended that under equitable principles the referee should have subordinated claims of those creditors to whom the mortgage was valid. The referee denied the mortgagees' request for subordination and held that they should participate in dividends in the same manner as other unsecured creditors. On appeal, this Court considered the sole question to be:

After the doctrine of *Moore v. Bay*, supra, has been invoked to invalidate a mortgage only partially invalid under state law, can the mortgagee obtain a subordination of the claims of creditors as to whom the mortgage was valid outside of bankruptcy, by appealing to the equitable powers of the bankruptcy court?

299 F.2d at 103-104

This court concluded that *Moore v. Bay* was controlling and the appellants could not achieve by indirection that which had already been denied directly. Obviously, this case did not involve the question presented here and simply is not relevant.

The appellant also relies upon some language in the dissenting opinion in *In re A. M. Townson & Co.*, 283 F.2d. 449, 461 (3rd Cir. 1960) (Appellant's Opening Brief at 17). Obviously, the dissenting opinion can not be considered the *ratio decidendi* of the case. Furthermore, that case did not involve receiver's Certificates. Judge Kalodner, in the opinion quoted by the appellant, merely stated that he believed the majority was in error in according a bank a first priority status under Section 64 a (1) by permitting the bank to set off an overdraft in one receiver's account against the deposits in another receiver's account since borrowing by the receiver was not authorized by the bankruptcy court and accordingly could not be considered a charge upon the bankruptcy estate.

The policy of Section 64 a (1) of the Bankruptcy Act is in part to promote the efficient administration of the superseding bankruptcy. Section 64 a (1) was amended to cure the undesirable result achieved in the *In re Columbia Ribbon Co.*, case, *supra*, p. 9, where costs of administration incurred in the superseding and superseded proceeding were treated on parity. It was the legislative judgment that unless the expenses and costs of administration in the superseding proceeding were accorded a superpriority, there was a substantial risk that such administrations would break down since the trustee could not be assured that the costs incurred by him would be paid ahead of prior unpaid costs and expenses. The amendment of Section 64 a (1) eliminated this problem by providing for a superpriority

for the costs incurred in the superseding proceeding. See 3, Collier, Bankruptcy ¶ 64.01 [3.2] at p. 2058 (14th ed. 1967). Section 64 a (1) does not eliminate or affect priorities previously accorded under Section 344 except for the superpriority accorded the costs incurred in a superseding bankruptcy. The petitioner has not cited any authority which holds that Section 64 eliminates or affects such priorities previously acquired under Section 344. *In re Delaware Hosiery Mills*, supra, p. 10, the court suggested that it was within the equitable powers of the bankruptcy court to grant such priorities. 202 F.2d at 953, fn. 6. See also *In re Bridgeford Co.*, 237 F.2d 182 (9th Cir. 1956) where the court recognized inferentially that receiver's Certificates may provide for and be accorded priority over other expenses of administration.

It is consistent with the policy underlying Section 64 a (1) to respect and give effect to the priorities granted pursuant to Section 344 to Receiver's Certificates over other costs incurred in a superseded Chapter XI proceeding. To do otherwise might impede efficient and effective administration during the Chapter XI proceeding. If creditors furnishing services and other consideration to the debtor in exchange for Receiver's Certificates can not be assured that the priority accorded them in their Certificates pursuant to Section 344 will be respected should bankruptcy follow, then it is likely that such creditors may not furnish such consideration when it is critically needed by the debtor.²

2. The District Court recognized the equitable and common sense reasons for according the certificates the priority to which they were expressly entitled. The Court said:

The action of the Referee in withdrawing the priority awarded to the certificates of indebtedness was erroneous and their priority should be reinstated. To hold otherwise would deal a serious blow to the effectiveness and utilization of certificates of indebtedness. It is not unreasonable to assume that

An analogous situation was discussed in *Nicholas v. United States*, 384 U.S. 678, 86 S. Ct. 1674 (1966). The question presented was whether a trustee in a superseding bankruptcy was liable for interest and penalties on federal taxes incurred by a debtor in possession during a Chapter XI proceeding. The Referee allowed the government's claim for the principal of the taxes but disallowed the claims for penalties and interest. On appeal, the Supreme Court held that interest would be allowed on the taxes incurred during the Chapter XI proceeding for the period prior to the filing of the petition in bankruptcy, stating:

The allowance of interest on Chapter XI debts until the filing of a petition in bankruptcy promotes the availability of capital to a debtor in possession and enhances the likelihood of achieving the goal of the proceeding, the ultimate rehabilitation of the debtor. Disallow-

Southwest and Producers, in accepting the certificates and loaning the money to the debtor, placed reliance on the provisions of the certificates awarding them a priority over other costs of administration. The Referee obviously thought that such a priority was equitable at the time he issued the certificates. The only change in circumstances from the time the certificates were issued to the date of the final order in bankruptcy was that the arrangement attempt had failed, and there were insufficient funds in the bankrupt's estate to meet all of the costs of administration. The Referee does not allege that the priority in the certificates was obtained by fraud or that the holders thereof have acted in bad faith. The Referee obviously expected the arrangement proceedings to work, and that the farming operations would net the estate considerable funds. The mere failure of this to happen and the resultant lack of funds to cover the administrative costs of the proceedings is not, in and of itself, grounds upon which one might, under his equitable powers, retract a previous guarantee of priority. This is, in fact, one of the very contingencies that the provisions as to priority would seem to guard against. To retract a priority which was granted under the equitable powers of the court because of the subsequent occurrence of events which accord the priority a meaningful status in the proceedings is to deny equity to the holders of the certificates, and render the initial power to award priorities a meaningless function. R. 201-202.

ance of interest on Chapter XI debts might seriously hinder the availability of such funds and might in many cases foreclose the prospect of the debtor's recovery. 384 U.S. at 687, 86 S. Ct. at 1681.

The same reasons and policy considerations apply here: unless the recipients of Receiver's Certificates can be assured that the priority granted in those Certificates will be respected, the availability of capital to the debtor will be severely restricted and the likelihood of achieving the goal of the proceeding will similarly be impaired.

The District Court recognized that, just as Section 64 a (1) provided an exception to the parity treatment in according priority to costs of administration in a superseding bankruptcy, so also did Congress allow for a special treatment of Receiver's Certificates of Indebtedness as set forth in Section 344 of the Act. However, even if the priority treatment accorded the Receiver's Certificates was not expressly authorized by statute, it would be within the equitable powers of the Bankruptcy Court to accord such priority. Cf. *In re Miracle Mart, Inc.* (3rd Cir. June 3, 1968) C.C.H. Bankruptcy Reports ¶62,784 at p. 72,388. In that case the referee authorized the rejection of the leases after the expiration of this six month period for filing claims, and he allowed the appellants ten days within which to file their claims arising out of the rejection of the leases. At that time, Section 355 of the Bankruptcy Act provided that claims would be allowed only if filed within six months after the first date set for the first meeting of creditors. On appeal, the Court of Appeals rejected the contention that the Bankruptcy Court did not have the power to mitigate Section 355 and held that resort to the equitable powers of a Bankruptcy Court was justified.

The appellant places emphasis upon the language of Section 344 which refers to "existing obligations". Although the appellant does not so state, we assume that it is arguing that under Section 344, the Bankruptcy Court is without power to authorize Receiver's Certificates with prospective priority over subsequent costs of administration incurred in the Chapter XI proceeding. This is a strained and artificial construction of Section 344. That language does not preclude granting priority to the Certificates over subsequent costs of administration. It seems clear that Congress expressly provided that the Referee could authorize priority over existing obligations since that was an extraordinary power and would affect creditors extending credit during the Chapter XI proceeding who, absent the language in Section 344, would do so without notice that their rights could be subsequently altered. Obviously, it was not necessary to expressly confer authority upon the Referee to authorize Certificates with priority over subsequent obligations since subsequent creditors would extend credit with notice that Receiver's Certificates had been issued with express priority. Accordingly, the appellant's contention is totally without merit. The appellant does not assert that it had no notice of the claims of Producers and Southwest to priority nor could it do so now. There are no equitable considerations which require that these holders of Receiver's Certificates be deprived of the priority to which they are otherwise entitled.

CONCLUSION

It is submitted that the law and the evidence support the opinion and order of the District Court and the amended findings of fact, conclusions of law and order of the Referee entered in accordance therewith and the order of the District Court should be affirmed.

Respectfully submitted,

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No. 22788

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22788

WHITE CHEMICAL COMPANY, Appellant,

v.

HENRY MORADIAN, RECEIVER in Bankruptcy
of CAL-ZONA FARMS, a Corporation, and
Henry Moradian, Trustee in Bankruptcy,
et al, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

REPLY BRIEF OF APPELLANT

McKESSON, RENAUD, COOK, MILLER & CORDOVA

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FILED

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I N D E X

	<u>Page</u>
Summary of Argument	1
Statement of Facts	2
Argument	3
Affidavit of Service by Mail	15

TABLE OF AUTHORITIES CITED

<u>Cases</u>	<u>Page</u>
Bridgford Co., In re (C.A. 9th, 1956) 237 F.2d 182 . .	6
Columbia Ribbon Co., In re (C.A. 3d, 1941) 117 F.2d 999.	7,8,12
Concentrated Products Corp., In re (C.A. 3d, 1930) 38 F.2d 745	10,11
Delaware Hosiery Mills, In re (C.A. 3d, 1953) 202 F.2d 951.	4,5,12
Judith Gap Commercial Co., In re, 5 F.2d 307	10
Miracle Mart, Inc., In re (2d Cir. June 3, 1968) C.C.H. Bankruptcy Reports, ¶ 62,784, p. 72,390. . .	3,5
Nicholas v. United States, 86 Sup. Ct. 1674, 384 U.S. 562.	8,9,11
Todd v. Zoda (C.A. 2d, 1951) 188 F.2d 84	4
Townson & Co., Bankrupt, In the Matter of (C.A. 3d, 1960) 283 F.2d 449.	8,9
<u>Statutes</u>	
Bankruptcy Act:	
§ 64(a)	9,11
§ 64(a)1.	2,9,12
§ 344	2,4,6,11,12

TABLE OF AUTHORITIES CITED

<u>Statutes</u> (Cont)	<u>Page</u>
11 U.S.C. § 104(a)	2
11 U.S.C. § 744.	2,4,6,11,12

<u>Text</u>	
Collier on Bankruptcy, Vol. 8 (14th Ed.)	
¶ 7.1, § 6.40, p. 1005.	4

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 22788

REPLY BRIEF OF APPELLANT

SUMMARY OF ARGUMENT

It is respectfully submitted to the Court that the Certificates of Indebtedness issued to SOUTHWEST FOREST INDUSTRIES, INC. (hereinafter referred to as SOUTHWEST), and to PRODUCERS COTTON OIL COMPANY (hereinafter referred to as PRODUCERS), are costs of administration in the superseded Chapter XI Bankruptcy Proceedings and as such are entitled to no priority over other costs of administration in the superseded Chapter XI proceedings. The Appellant, WHITE CHEMICAL COMPANY (hereinafter referred to as WHITE), furnished goods and services to the debtor corporation, as set forth in the Transcript of Record at pages 143 and 144, which had a reasonable value of twenty-eight thousand four hundred fifty-one and 28/100 (\$28,451.28) dollars. This amount was allowed as a cost of administration of the superseded Chapter XI proceedings (Transcript of Record, page 147).

It is further submitted to the Court that the Bankruptcy Court has no power, authority or jurisdiction to exercise equitable powers which have the effect of circumventing the enactments of Congress, as such enactments have been set forth in the Bankruptcy Act and, in particular, in § 344 (11 U.S.C. § 744) and in § 64(a)1 of the Bankruptcy Act [11 U.S.C. § 104(a)1].

It is submitted that under § 344 (11 U.S.C. § 744), the authority of the Court is restricted to granting unto Certificate holders security and priority over "*existing obligations*" and not over other costs of administration.

It is further submitted that under § 64(a)1 of the Bankruptcy Act [11 U.S.C. § 104(a)1], all costs of administration which have been incurred and are unpaid are on a parity and should share on a pro rata basis in the assets available after the payment of the costs of administration of the superseding bankruptcy proceeding.

STATEMENT OF FACTS

It is submitted that the facts that are pertinent and controlling upon the decision in this case are as they have been set out in the prior briefs of appellant and appellees and as set forth in the portions of the Transcript of Record

which have been referred to by both appellant and appellees in prior briefs and herein.

ARGUMENT

It is respectfully submitted to the Court that two sections of the Bankruptcy Act control the case at bar. It is further submitted that these statutes are concise and contain no ambiguities.

It is further submitted that these two statutes should be followed, as they have been enacted by Congress and that when this is done the appellant will then be found to be entitled to share equally with appellees in the funds available for the payment of the costs of administration of the superseded Chapter XI proceedings.

Appellees have cited two cases in addition to the ones cited to the Court in Appellant's Opening Brief. On page 15 of Appellee's Brief, the case *In re Miracle Mart, Inc.* (3rd [sic] Cir. June 3, 1968), C.C.H. Bankruptcy Reports ¶ 62,784 at p. 72,388 is cited. At p. 72,390 of the C.C.H. Report the Second Circuit noted:

"Instead, we have a series of inconsistent sections which create a fundamental ambiguity. We are required, therefore, to construe the Bankruptcy Act as best we

can. We believe that in such circumstances resort to the equitable powers of a bankruptcy court to fashion a remedy for this aberrant situation is justified." (Emphasis added)

It is submitted that in the case at bar, we do not have any inconsistent sections, and it is submitted further that throughout the course of this litigation the appellees, before the Referee, the District Court, and now before this Court, consistently and constantly disregard, overlook and hope that the words of the statute, that it is submitted are controlling, will fade away. These words are "*existing obligations*" as set forth in § 344 (11 U.S.C. § 744).

COLLIER ON BANKRUPTCY, Vol. 8 (14th ed. 1967), at pp. 1004, 1005 and 1006, treats this language relating to existing obligations. In ¶ 7.1 of § 6.40 at p. 1005 of COLLIER ON BANKRUPTCY, as above cited, this learned treatise states that the Certificates may be made superior to costs of administration and cites as its authority *Todd v. Zoda* (C.A.2d, 1951) 188 F.2d 84, and *In re Delaware Hosiery Mills* (C.A.3d, 1953) 202 F.2d 951. In the case of *Todd v. Zoda*, *supra*, the Second Circuit stated at p. 86 of the opinion:

"This Court has recognized that in exceptional instances equitable considerations may justify a court of bankruptcy in validating an unauthorized loan as an expense of administration. None of these cases involved the question whether equitable considerations would justify a loan-claimant in obtaining priority in payment over prior lenders to the debtor in possession or over subsequent expenses of administration advanced by creditors who had no notice of the loan-claimant's claim to priority."

As pointed out in Appellant's Opening Brief, *In re Delaware Hosiery Mills, supra*, has a footnote numbered 6 on p. 953 of the Report, which states:

" . . . research has not disclosed any case where there was a provision that the certificate or loan had priority over expenses of administration."

Appellees state "the granting of such priority to Receiver's Certificates is authorized by Section 344" (Appellees' Brief, p. 1). On p. 15 of Appellees' Brief, they state:

" . . . however, even if the priority treatment accorded the Receiver's Certificates was not expressly authorized by statute, it would be within the equitable powers of the Bankruptcy Court to accord such priority."

This is the language that *In re Miracle Mart, Inc., supra*, is cited in support of. It must be remembered that in the *Miracle Mart* case the Court specifically found a series of

inconsistent sections which were subsequently cured by amendment to the Bankruptcy Statutes as noted in that case.

It is respectfully submitted that § 344 of the Bankruptcy Act (11 U.S.C. § 744) does not under any stretch of the imagination nor under any judicial construction known to the appellant authorize the granting of priority to a Certificate holder over another cost of administration. The plain, clear, concise and unambiguous language states that the Certificate may be given priority *over existing obligations*. It is submitted that if Congress had intended the Certificate holder to have priority over other costs of administration, Congress would then in its infinite wisdom have stated "over existing obligations and other costs of administration."

The appellees cite a case out of this Circuit, *In re Bridgford Co.* (C.A. 9th, 1956) 237 F.2d 182. In that case at p. 186, this Court stated:

"There is no need to consider the priority status of the claims of the Oregon farmers nor the status of the certificates had they been retained by Hadley for, as we have pointed out, Bridgford is precluded from collecting more than he paid for a claim against an insolvent corporation to which he owed a fiduciary duty."

It is submitted that based upon that language the

statement on p. 13 of Appellees' Brief is incorrect where appellees state that this Court recognized inferentially that Receiver's Certificates may provide for and be accorded priority over other expenses of administration. It is submitted that the ratio decidendi of that case was that a fiduciary could not profit from a transaction as against the person to whom a duty was owed and in particular when there was no consideration flowing in the acquisition of the claim.

It is respectfully submitted to the Court that the case at bar is novel. The appellant has been unable to find a Court decision in the entire United States that has ruled upon the problem in the case at bar. In the case of *In re Columbia Ribbon Co.* (C.A.3d, 1941) 117 F.2d 999, the ratio decidendi of the decision was the parity or priority between costs of administration of a chapter proceeding and a superseding bankruptcy. This case was decided prior to the amendment which accords priority to the costs of administration of a bankruptcy proceeding that supersedes a chapter proceeding. In the *Columbia Ribbon* case, the Court stated at p. 1001:

" . . . since Congress has set up no order of priority within the first class the Court may not fix priorities within the class."

Since that time, Congress has established one subpriority. *It does not relate to Receiver's Certificates.*

It is respectfully submitted that no authority has been cited to hold that loans to a receiver are not costs of administration. Notwithstanding the degradation to which a dissenting opinion was subjected by the appellees, in the case of *In the Matter of A. M. Townson & Co., Bankrupt* (C.A.3d, 1960) 283 F.2d 449, appellant still feels that the language from that dissent is a correct statement of the law where it is stated, as cited in Appellant's Opening Brief, on p. 17:

"... court-authorized loans made to receivers to finance their operations are in the category of 'the actual and necessary costs and expenses of preserving the estate' and are accorded first priority as an 'expense of administration.'"

In re Columbia Ribbon Co., supra, states at p. 1001:

"It follows that the court in determining the priority of claims against the estate is bound by the provisions of Section 64 sub. a, as amended, 11 U.S.C.A. § 104 sub. a, which specify the classes of debts which are to have priority of payment over general creditors of a bankrupt estate and the order of their payment with respect to each other."

This language in light of *Nicholas v. United States*, 86 Sup. Ct. 1674, 384 U.S. 562, would seem to indicate

that the equitable power of the Bankruptcy Court is limited since Congress has superseded such equitable power with its statutory enactments. At p. 1683 of the Supreme Court Report, it is stated:

" . . . the strong policy of § 64 a (1) of the Bankruptcy Act, . . . establishes a sharply defined priority that places all expenses of administration on a parity,"

It is true that in the *Nicholas* case, tax problems were being litigated, but it is respectfully submitted that the Supreme Court has indicated that the priorities established by § 64(a) of the Bankruptcy Act are sharply defined and that under § 64(a)1 all expenses of administration, including claims for taxes which were a cost of administration, in that case, are on a parity.

It is therefore respectfully submitted to this Court, that since the funds derived through the vehicle of the Certificates of Indebtedness are properly classified as a cost of administration, *In the Matter of A. M. Townson & Co., supra*, the fact that that cost of administration is evidenced by a Certificate of Indebtedness should not give to it priority over other costs of administration, even though the Certificate provides for such priority. It is this provision of priority in the Certificate that the

appellant has constantly challenged throughout the course of these proceedings.

In the case of *In re Concentrated Products Corp.* (C.A.3d, 1930) 38 F.2d 745, the Court stated at p. 747:

"But, despite the equitable nature of much of the bankruptcy court's undertakings and procedure, the fact remains that there is a wealth of statutory enactment which places definite limits on the court's action, and which the court has no right to vary."

The Court at p. 747 cited the following language from *In re Judith Gap Commercial Co.*, 5 F.2d 307 at 309:

". . . Nor is it inconsistent with the established doctrine that always is jurisdiction in bankruptcy limited by statute, and that though bankruptcy proceedings are equitable in their nature and must be carried on as such, nevertheless they are to be administered in accord with the Bankruptcy Act and general orders, and not by virtue of any broad unlimited equity power. [Citations omitted]."

(Emphasis added)

It is further submitted to the Court that the appellant fully and completely recognizes the equitable power of the Bankruptcy Court. However, the appellant respectfully submits to the Court that in this case statutory enactment has placed definite limits on the Court's equitable power, including the prohibition against granting

one cost of administration priority over another cost of administration.

The appellees have distinguished appellant's cases and it is true that none of them deal directly with what it is submitted is in issue in this case. It is simply the best we could do, because, as stated hereinbefore, the appellant has been unable to find any case which is right in the "rumble seat."

In conclusion, it is respectfully submitted that the Bankruptcy Court, under § 344 (11 U.S.C. § 744) had authority to authorize the borrowing of money and issuing of Certificates of Indebtedness evidencing such loans but the Bankruptcy Court was limited in that it could only grant to the lender and Certificate holder, the appellees herein, security and priority *over existing obligations*. Under the *Nicholas v. United States* case, *supra*, the sharply defined priorities established by § 64(a) of the Bankruptcy Act, deprive the Court of equitable power to vary these priorities as they have been established by Congress.

In re Concentrated Products Corp., *supra*, it is submitted, lays down the principle that the equitable powers of the Bankruptcy Court must always give way and are limited to the extent that Congress has enacted specific

statutes relating to the subject matter in issue. *In re Delaware Hosiery Mills, supra*, in the footnote states that no case can be found as of that date and none have been found by the appellant, wherein debts evidenced by Certificates of Indebtedness issued pursuant to § 344 (11 U.S.C. § 744) were given priority over other costs of administration.

In re Columbia Ribbon Co., supra, states on p. 1002:

" The Court may not by granting a priority which it deems equitable set aside the clear congressional mandate that no such priority shall be accorded. . . . "

It further stated:

" But these equitable powers are to be exercised within the limits laid down by the Bankruptcy Act and subject to its specific provisions. . . . "

It is further submitted that the Bankruptcy Act must be considered as a whole and it is submitted that Congress in its wisdom was aware of a difference between "existing obligations" as stated in § 344 (11 U.S.C. § 744) and costs of administration as stated in § 64(a)1. That by reason of such congressional wisdom, it is submitted that if Congress had intended that Certificates of Indebtedness have priority over other costs of administration, it very

easily could have stated "over existing obligations and other costs of administration." *This Congress did not do.*

The appellant quarrels not with the equitable power of the Bankruptcy Court. Appellant takes the position and respectfully submits to this Court that the equitable power of the Bankruptcy Court has been superseded by congressional enactment.

The appellant further submits to this Court that the claims of the appellees represented by the Certificates of Indebtedness are costs of administration. The provisions contained in such Certificates, according unto the holder thereof a priority over other costs of administration, are provisions that have been allowed by the Bankruptcy Court in excess of its authority to grant the same. The clear intent of Congress, it is submitted, is spelled out in the two applicable statutes. This statutory language authorizes the Bankruptcy Court to authorize Certificates of Indebtedness and to accord to such Certificates priority *over other existing obligations*. The holder of such Certificate, it is submitted, is merely another claimant for a cost of administration expense.

Based upon the foregoing, the Opening Brief of the Appellant herein, and the failure of appellees to show

authorities to the contrary, it is respectfully submitted that this case should be remanded to the District Court under a mandate requiring the District Court sitting as a Court of Bankruptcy to distribute all funds and assets available after the costs of the superseding bankruptcy to the claimants for the cost of administration in the superseded bankruptcy on a pro rata basis including the appellant herein.

Respectfully submitted,

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By Joseph B. Miller

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AFFIDAVIT OF SERVICE BY MAIL

JOSEPH B. MILLER, being duly sworn, says that he deposited two (2) copies of the foregoing Reply Brief of Appellant in final printed form in the United States Post Office in the City of Phoenix, State of Arizona, enclosed in envelopes duly addressed as follows:

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Postage on the foregoing mailings was fully prepaid; he further states that he deposited twenty-five (25) copies in the United States Post Office in the City of Phoenix, State of Arizona, duly addressed to the Office of the Clerk, U. S. Court of Appeals for the Ninth Circuit, San Francisco, California 94101.

All mailings were made on the 1st day of August,
1968.

/s/ Joseph B. Miller

Joseph B. Miller

Subscribed and sworn to before me
this 1st day of August, 1968.

/s/ Catherine F. Howard

Notary Public

[SEAL]

My commission expires
September 29, 1971

NO.

22791

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BARROW DEVELOPMENT COMPANY, INC.,)

Appellant,)

v.

THE FULTON INSURANCE COMPANY,)

Appellee.)

APPEAL FROM THE UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

APPELLANT'S BRIEF

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INDEX AND TABLE OF AUTHORITIES

Page

CASES:

CRISCI v. SECURITY INS. CO. OF NEW HAVEN, CONN., 426 P.2d 173 (1967).....	10, 11, 12
ROTH v. NORTHERN ASSUR. CO., 203 NE.2d 442 442 (Ill. 1964).....	14

STATUTES

A.S. 09.10.240	13
CALIFORNIA CIVIL CODE, SECTION 3333.....	12

LAW REVIEW ARTICLES:

KEETON, LIABILITY INS. & RESPONSIBILITY FOR SETTLEMENT, 67 Harv. L. Rev. 1136.....	10
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JURISDICTIONAL STATEMENT

This action was commenced by the filing of a complaint in the Superior Court, Fourth Judicial District, Alaska and thereafter removed to the United States District Court for the District of Alaska, and a final decision dismissing the plaintiff-appellant, Barrow Development Company, Inc.'s, claim against The Fulton Insurance Company was rendered on January 18, 1968.

This appeal is taken from said decision pursuant to the provisions of 28 U.S.C. 1291 which confers jurisdiction of appeals from all final decisions of the United States District Court in the United States Court of Appeals, and 28 U.S.C. 1294(1) which designates the circuit embracing said district as the proper Court of Appeals to which such appeal shall be directed.

STATEMENT OF FACTS

The facts that give rise to the above case commenced in August of 1964 when Barrow Development Company purchased from the Fulton Insurance Company a certain inventory insurance policy on its goods in its warehouse at Barrow, Alaska, in the sum of \$50,000. (Record, p.24). This insurance policy required monthly reporting of the value of the inventory and, if the reports were not made, the maximum amount that would be paid under the policy if the goods were destroyed was \$37,500. (Record, p.29).

At approximately the same time that this insurance policy was taken out, Barrow Development Company took out a number of other insurance policies of fire insurance and extended coverage insuring its real property and other property in Barrow, Alaska. (Record, p. 156, 329). The insurance policy in question concerning the inventory and the other insurance policies were purchased through an insurance agent in Nome, Alaska, named Pete Hahn, (Record, p. 112). Mr. Hahn instructed Barrow Development Company to send him the monthly reporting documents for the inventory policy.

After the policy was in effect, Barrow Devel-

opment Company employed Kohler & Johnson, a firm of certified public accountants in Fairbanks, Alaska, to take care of its accounting matters and also to mail in the monthly inventory reports to Pete Hahn in Nome. (Record, p. 113). Kohler & Johnson mailed in certain of these inventory reports to Pete Hahn in Nome and Pete Hahn mailed certain reports on to the company, but at the time of the fire which completely destroyed Barrow Development Company's property in Barrow, Alaska, on December 14, 1964, the monthly inventory reports were not up to date because Pete Hahn had not sent one or two reports to the insurance company and Kohler & Johnson had not forwarded Pete Hahn the latest monthly inventory report 341-2.

After the embers cooled Barrow Development Company made claim to the various insurance companies for its fire losses, including the defendant the Fulton Insurance Company, and the real property damage was paid in total in the approximate sum of \$260,000 without any question. (Record, p. 105). From the beginning the defendant Fulton Insurance Company, dragged its feet on paying off the inventory policy. The Fulton Insurance Company demanded of Barrow Development Company a complete and detailed inventory of what burned in the

fire. (Record, p. 99) Barrow Development Company not produce this inventory because its records were destroyed in the fire along with the inventory. (Record, p. 101).

Barrow Development Company filed a proof of loss with the Fulton Insurance Company on the 29th day of January 1965, for a loss of inventory in the sum of \$50,000. (Record, p. 100). The Fulton Insurance Company sent General Adjustment Bureau to Barrow, Alaska, and vicinity to investigate Barrow Development Company claim of inventory property loss. The Fulton Insurance Company informed Barrow Development Company that the maximum they would pay under the policy if the value of the inventory could be proved was \$37,500 due to the improper filing of the monthly reporting forms. (Record, p. 345). Barrow Development Company being pressed by its creditors, demanded \$50,000 from the Fulton Insurance Company for its inventory loss. (Record, p. 102). The Fulton Insurance Company made impossible demands upon Barrow Development Company concerning its inventory, and in response to these demands Barrow Development Company again explained to the Fulton Insurance Company that it could not in detail substantiate its inventory

because the records were destroyed along with the property.

Robert Keller, president of Barrow Development Company . . . wrote Pete Hahn, the agent who sold Barrow Development Company the Fulton insurance policy, on a number of occasions asking why the Fulton Insurance Company was refusing to honor Barrow Development Company's claim and, as the record reflects, Hahn told Keller not to worry, that the Fulton Insurance Company was a tough group but he would be paid in the end and wouldn't have to sue. (Record, p. 342). Almost immediately after this correspondence, it became clear that the Fulton Insurance Corporation's claim for the loss of its inventory, and Robert Keller, as president of Barrow Development Company on the 8th day of February, 1965, filed a lawsuit on behalf of the corporation, with himself acting as attorney, against the Fulton Insurance Company. (Record, p. 39). The Fulton Insurance Company filed an answer to the Barrow Development Company complaint and numerous discovery proceedings occurred thereafter, and the action finally culminated in a judgment of dismissal on the 28th day of March, 1966 for the failure of Barrow Development

Company, to appear for trial. Immediately thereafter Barrow Development Company through its president, Robert Keller, engaged John M. Savage as its attorney and this judgment of dismissal was set aside on the 24th day of June, 1966 upon the payment by Barrow Development Company to the Fulton Insurance Company of the sum of \$1510.82 in costs and attorney's fees. (Record, p. 330).

After the case was reinstated, the defendant Fulton Insurance Company, moved to dismiss the Barrow Development Company' complaint on the basis that the plaintiff, Barrow Development Company was not a corporation in good standing at the time it filed its complaint originally, it not having filed its annual reports and paid its annual corporation tax in accordance with Alaska statute and that this fact was not pleaded in plaintiff's complaint in accordance with Alaska law. (Record, p. 334). Barrow Development Company admitted that these facts were true and the Superior Court, Third Judicial District, Anchorage, Alaska dismissed Barrow Development Company, Inc.'s complaint without prejudice

on the 13th day of June, 1967. In the meantime on the 20th day of January, 1967, Barrow Development Company, Inc. filed the present action in the Superior Court, Fourth Judicial District, Fairbanks, Alaska against the Fulton Insurance Company for tortious activity in its failure to pay the Barrow Development Company, Inc.'s losses and in its adjustment of the claim and complete handling of the matter. This action was subsequently removed to the United States District Court for the District of Alaska.

The District Court granted summary judgment to the defendant insurance company on the ground that the action had not been brought within a year of the date the loss occurred, as was required under the provisions of the policy even though the complaint charged not a breach of the terms of the contract but rather a tort cause of action.

SPECIFICATIONS OF ERROR

I

The District Court erred in making Finding of Fact Number 6 in that plaintiff's cause of action sounds in tort rather than contract.

II

The District Court erred in making Finding of Fact Number 9 in that the one-year limitation under the provisions of the fire insurance policy had been tolled by the filing of plaintiff's complaint February 8, 1965

ARGUMENT

I

THE COURT ERRED IN FINDING THAT THIS ACTION WAS BROUGHT TO ENFORCE THE PROVISIONS OF THE FIRE INSURANCE POLICY AND THEREBY SUBJECT TO THE ONE-YEAR LIMITATION OF TIME FOR COMMENCEMENT OF AN ACTION CONTAINED IN THE POLICY.

The court found:

"That the Plaintiff commenced this contract cause of action in connection with the fire insurance policy IFP-343209 to recover damages for inventory losses sustained as a result of the aforementioned fire in the Superior Court for the State of Alaska, Fourth Judicial District, on January 20, 1967."

This finding was clearly erroneous. The complaint sounds in tort and not in contract. The complaint alleges:

"III

"That on or about December 14, 1964 plaintiff suffered a complete loss by fire of its buildings and inventory at Barrow, Alaska.

"IV

"That plaintiff notified defendant of its loss under the terms of the aforementioned policy and defendant undertook, through its agent, General Adjustment Bureau, the adjustment of the loss caused to plaintiff by the fire.

.....

"VI

"That defendants representative and agent, General Adjustment Bureau, sent an adjuster to Barrow, Alaska to adjust plaintiffs loss and the same was wantonly, recklessly, and negligently adjusted in that the adjuster did not determine by any reasonable means available the value of the goods plaintiff lost in the fire.

"VII

"That plaintiff cooperated with defendant and defendant's agent in adjusting said fire loss to the best extent of his ability and the defendant willfully, maliciously, wantonly, recklessly and negligently never offered to pay plaintiff anything for the loss of plaintiff's inventory in the aforementioned fire.

"VIII

"That plaintiff was informed of defendants refusal to pay plaintiff anything under its policy for plaintiff's loss on or about January 25, 1965 by defendant and its agents.

.....

"X

"That as a direct and proximate result of defendant's willful and malicious acts, the plaintiff was forced to file suit on its claim against the defendant and has never to this date been paid anything for the loss of its inventory by the defendant.

"XI

"Because the defendants acts were willful, malicious and intentional, and designed to injure plaintiff, plaintiff has suffered general damages in the sum of \$50,000 plus interest

and plaintiff is entitled to punitive damages in the sum of \$50,000 to punish the defendant for its malicious and willful acts."

It is plaintiff's theory that an insurance company owes its insured a duty to exercise reasonable care in the adjustment and settlement of claims; that this duty arises from the relationship of insurer and insured and exists independent of any terms of the contract and that a breach of this duty sounds in tort rather than contract. Practically every jurisdiction in which the question has arisen has held that recovery may be had on such a theory.¹

The best example is the Supreme Court of California's recent decision in Crisci v. Security Ins. Co. of New Haven, Conn., 426 P.2d 173 (1967), in which the court subscribed to the general view that an insurance company's power to affect the interests of its insured

¹ See cases cited in Keeton, Liability Ins. & Responsibility For Settlement 67 Harv. L. Rev. 1136, 1138 n. 5

as well as its own interests is accompanied by responsibility for its exercise, regardless of the fact that such responsibility is not expressed in the policy and that the breach of that duty is treated as sounding in tort.

These were the facts in Crisci, supra: An injured claimant brought a negligence suit against the plaintiff who had \$10,000 of insurance coverage under a general liability policy issued by defendant. Defendant rejected a \$9,000 settlement offer, the suit went to trial and the claimant was awarded a \$100,000 judgment against the plaintiff. The plaintiff brought suit against the insurance company for wrongfully refusing to settle within the policy limits. The trial court found that the defendant had breached its duty to settle in good faith, and plaintiff was awarded the amount of the adverse judgment in excess of the policy limits, and, in addition, she recovered \$25,000 for mental suffering. The Supreme Court of California affirmed both awards on

the basis of California Civil Code, Section 3333, which provides that:

"For the breach of an obligation not arising from contract, the measure of damages . . . is the amount which will compensate for all the detriment proximately caused thereby. ."

Crisci was a tort case, and Barrow Development Company, Inc. v. the Fulton Insurance Company is a tort case, and the fact that this action was not started within the time allowed by the policy is quite irrevelant.

A.S. 09.10070 provides that tort actions must be brought within two years; it is clear that this action was brought within the time allowed.

Plaintiff has pleaded a valid cause of action completely independent of the provisions of the fire insurance policy and therefore in no way affected by the one-year limitation contained therein; for this reason the summary judgment granted by the District Court must be reversed and plaintiff given the opportunity to prove-- if it can--the material allegations of its complaint.

II

THE TRIAL COURT ERRED IN FINDING THAT THE CONTRACTUAL LIMITATION OF TIME EXPRESSED IN THE PROVISIONS OF THE FIRE INSURANCE POLICY HAD NOT BEEN TOLLED BY THE FILING OF PLAINTIFF'S COMPLAINT FEBRUARY 8, 1965.

The trial court found:

"That the Plaintiff's contract cause of action was not commenced within one year after the aforementioned fire loss occurred, which was required under the express terms of the fire insurance policy provisions."

This finding was clearly erroneous. Robert A. Keller filed a complaint against The Fulton Insurance Company on behalf of Barrow Development, Inc. February 8, 1965 pleading a contract cause of action. That complaint was dismissed for plaintiff's failure to prosecute March 28, 1966. This dismissal was set aside June 24, 1966. The complaint was dismissed again June 13, 1967. Another complaint, pleading the contractual cause of action, was filed January 11, 1968 and is still pending.

A.S. 09.10240 provides that:

"If an action is commenced within the time prescribed and is dismissed upon the trial

or upon appeal after the time limited for bringing a new action, the plaintiff . . . may commence a new action upon the cause of action within one year after the dismissal or reversal on appeal"

It is the general rule that statutes such as A.S. 09.10.240 apply to contractual as well as statutory limitations.

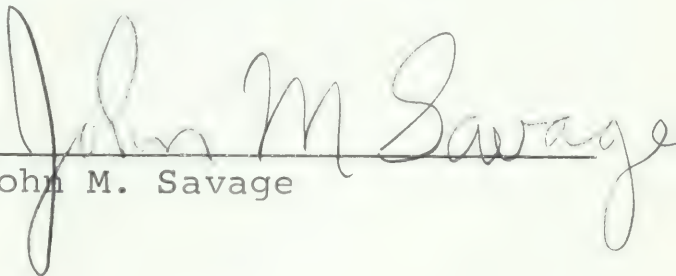
Roth v. Northern Assur. Co., 203 NE.2d 442 (Ill. 1964).

It will be seen, therefore, that at the time this action was brought there was pending -- and there is still pending -- in the Alaskan courts an action by the plaintiff against the defendant alleging a breach of contract. If this action sounds in contract, it may be subject to abatement, but timely it certainly was.

CONCLUSION

For the foregoing reasons as stated in the arguments in the body of this brief, the United States District Court for the District of Alaska erred in granting the Fulton Insurance Company's motion for summary judgment, and the judgment should be reversed and the United States District Court for the District of Alaska should be instructed to proceed to hear plaintiff-appellant's cause of action.

SAVAGE, ERWIN & CURRAN
Attorneys for Appellant

By 
John M. Savage

NO. 22,791

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BARROW DEVELOPMENT COMPANY, INC.,)
)
Appellant)
)
VE)
)
THE FULTON INSURANCE COMPANY,)
)
Appellee)

BRIEF OF APPELLEE

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Anchorage, Alaska

FILED

APR 2 1968

APR 8 1968

NO. 22,791
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vs)
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Appellee)

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SUBJECT INDEX

	<u>Page</u>
JURISDICTION AND PLEADINGS	1
STATEMENT OF CASE	3
SUMMARY OF ARGUMENT	6
Argument No. 1	6
Argument No. 2	6
Argument No. 3	7
ARGUMENT	8
I. The Court Properly Decided That the Lawsuit Constituted an Action in Contract to Enforce the Terms of the Fire Insurance Policy and that the Failure of the Insured to Bring an Action Within the One Year Limitation Provision Barred any Recovery in this Action.	8
II. The Contract Limitation Provision in the Fire Insurance Policy Governs Actions in Contract or Tort	14
III. Under the Alaska Law the Plaintiff's Complaint Filed February 8, 1965 was a Nullity and of no Legal Effect, and the Court Properly Found that the Contractual Limitations were Therefore Enforceable Against the Complaint Filed on January 17, 1967	18
CONCLUSION	22

TABLE OF AUTHORITIES CITED

<u>Cases</u>	<u>Page</u>
Alaska Mines and Minerals, Inc. vs. Alaska Industrial Board, 354 P.2d 376 (1960)	21,22
Barr vs. Carroll, 274 P.2d 717 (Cal. 1954)	19
Bell vs. Quaker City Fire & Marine Insurance Company, 370 P.2d 219* (Ore. 1962)	18
Blanton vs. Northwestern National Insurance Company, 335 F.2d 965 (9th C.A. 1964)	14
Bortho vs. Polish Natl. Alliance of the U.S. of North America, 119 P.2d 536 (Kan. 1941)	20
Brown vs. Coats, 253 F.2d 36 (D.C. Cir. 1958)	12
Crisci vs. Security Insurance Company of New Haven, Connecticut, 426 P.2d 123 (Cal. 1967)	12,13
Crow vs. City of Lynwood, 337 P.2d 919 (Cal. 1959)	19
Furr vs. Societa Ital. Transp. Marit. Genoa, Italy, 162 F. Supp. 645 (Dist. Ct. N.Y. 1958)	15
Jorgensen vs. Baker, 157 N.E.2d 773 (Ill. 1959) Cert. Den. 80 Sup. Ct. 590, 361 U.S. 962, 4 L.Ed.2d 543	20
Kohnle vs. Paxton, 188 S.W. 155, 159 (Mo. 1916)	10
Margulies vs. Quaker City Fire & Marine Insurance Company, 97 N.Y.S.2d 100 (N.Y. 1950)	17-18
Marks vs. St. Francis Hospital and School of Nursing, 294 P.2d 258 (Kan. 1956)	20
Moffet vs. Kansas City Fire & Marine Insurance Company, 244 P.2d 228 (Kan. 1952)	11
Muse vs. Heime, 189 So.2d 840 (La. 1966)	15
Otto vs. Imperial Casualty & Indemnity Company, 277 F.2d 889 (C.A.A. 8th Cir. 1960)	10
Peterson vs. Sherman, 157 P.2d 863, 866 (Cal. 1945)	8-9

Proc vs. Home Insurance Company, 270 N.Y.S.2d 412 (N.Y. 1966)	14
Ramsey vs. Home Insurance Company, 125 S.E.2d 201 (Va. 1962), 95 A.L.R.2d P.1019	18
Reece vs. Massachusetts Fire & Marine Insurance Company, 130 S.E.2d 782 (Ga. 1963)	15,16
Sager Glove Corp. vs. Aetna Insurance Company, 317 F.2d 439 (7th Cir. 1963)	14
Sauer vs. Law, Union and Rock Insurance Company, 17 F.R.D. 430 (D.C. Alas. 1954)	14
Steinour vs. Oakley State Bank, 287 P. 949 (Idaho 1930)	19
Sutker vs. Pennsylvania Insurance Company, 155 S.E.2d 694 (Ga. 1967)	9

Statutes

A.S. 09.10.070	18
A.S. 09.10.240	7,19,20,22
A.S. 10.05.720	21
A.S. 21.10.060	11,12
A.S. 21.25.030	6,17,18
S.L.A. 1959, Ch. 182 §3(a)	17
S.L.A. 1966, Ch. 120 §1	17
28 U.S.C.A. §1291	2
28 U.S.C.A. §1294(1)	2
28 U.S.C.A. §1332 and §1441	1

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(1954) 445 16



On June 16, 1967 The Fulton Insurance Company filed a Motion for Summary Judgment in the United States District Court, District of Alaska. (R. 20) On January 18, 1968 the District Court granted the Fulton Insurance Company's Motion for Summary Judgment and entered its judgment with Findings of Fact and Conclusions of Law accordingly. (R. 360-362) The Appellant, Barrow Development Company, Inc., filed a Notice of Appeal from the judgment entered by the District Court. (R. 363) This is a direct appeal from a final decision of the United States District Court and this court has jurisdiction pursuant to 28 U.S.C.A. §1291 and 28 U.S.C.A. §1294(1).

II

STATEMENT OF CASE

The Barrow Development Company purchased a standard provisional form fire insurance policy, No. 1FP 343209 from The Fulton Insurance Company on August 28, 1964, with policy limits of \$50,000.00. (R. 24-31) This fire insurance policy pertained solely to inventory of goods, wares and merchandise on stock in the insured's premises. (R. 29)

On December 14, 1964 whatever inventory was on hand at the insured's premises at Barrow, Alaska was destroyed. (R. 4) A lawsuit was filed in the Superior Court, Fourth Judicial District, State of Alaska, on January 17, 1967. (R. 4-7)

The Fulton Insurance Company filed a Petition for Removal to the United States District Court for the District of Alaska. (R. 1-2) An answer to the complaint was filed in the United States District Court on January 31, 1967. (R. 14-16)

The Fulton Insurance Company filed a Motion for Summary Judgment based solely on its sixth affirmative defense as plead in its answer. (R. 16,20-21) In opposition to the Motion for Summary Judgment the Barrow Development Company, Inc., asserted that it had filed a complaint on February 8, 1965 in the Superior Court for the Third Judicial District, State of Alaska, Cause No. 65-181 B and that this action was dismissed without prejudice on June 13, 1967. (R. 37-41)

The Motion for Summary Judgment was scheduled to be heard on September 8, 1967. (R. 56) The Appellant made a Motion for Continuance on August 29, 1967. (R. 57-61) The motion to continue was denied, however, the appellant was given leave to file an affidavit and supplemental memorandum supporting its position in this matter and the Appellee was allowed an additional week after service of the aforementioned to file a supplemental reply. (R. 73)

The Barrow Development Company, Inc., filed a supplemental memorandum in opposition to the Motion for Summary Judgment on September 22, 1967. (R. 77-79) On October 2, 1967 The Fulton Insurance Company filed its supplemental reply memorandum with exhibits. (R. 81-137) On October 5, 1967 Appellant's counsel filed an affidavit with exhibits attached. (R. 140-356) On October 10, 1967 Appellee's counsel filed an objection to the affidavit and exhibits on the grounds that this was not proper or allowed under the Rules of Procedure and furthermore that the exhibits were not relevant or material to the issue raised in the Motion for Summary Judgment or supplemental briefs filed by the parties for determination thereof. (R. 357) Appellant's counsel has improperly included in his statement of facts on this appeal matters shown in the record from pages 140 through 356 which are not relevant, competent or material to the issue raised in the Motion for Summary Judgment nor are they related to the specifications of error set forth in Appellant's brief

on page 8. Appellee's counsel controverts the employment or usage of the matters embodied in the record pages 140-356 as constituting facts which pertain to the issues presented in this appeal. Appellee's counsel further states that the matters referred in the record pages 140-356 do not fully and accurately portray all the matters that were material or relevant to the proceedings involved in and decided by the Superior Court in action No. 65-181 B.

The District Court granted the Motion for Summary Judgment and entered its Findings of Fact and Conclusions of Law on January 18, 1968. (R. 360-362)

III

SUMMARY OF ARGUMENT

ARGUMENT NO. 1

The Appellant attempts to circumvent the one-year contract limitation specified in the fire insurance policy by claiming that this suit sounds in tort rather than contract. A contract action is not convertible to a tort action by simply alleging such or employing words which constitute a conclusion and do not allege facts supporting a tort cause of action. The rights, duties and obligations of the parties are expressly provided for in the provisions of the fire insurance policy. The very existence and creation of these rights, duties and obligations arise solely by virtue of the fire insurance policy and not by a duty imposed by law. The insured, not the adjuster, was obligated to establish the reasonable value of the goods lost by fire as expressly required under the terms of the fire insurance policy. Therefore, this contract cause of action was barred under the one-year suit limitation provision.

(infra 8-13)

ARGUMENT NO. 2

Contract and tort actions can both be subject to a contractual time limitation provision. The one-year time limitation provision under the fire policy involved herein pertains to either a contract or tort action. The Alaska Statute A.S. 21.25.030 adopted the 1943 New York standard fire insurance policy and the case law indicates that any cause of action

thereon commences to run from the date of the fire loss which was December 14, 1964. The complaint in this action dated January 17, 1967 would be barred under the two-year Statute of Limitations even if no suit limitation provision had been provided for in the fire policy. (infra 14-18)

ARGUMENT NO. 3

The Barrow Development Company had no right to bring a cause of action under the Alaska law when a complaint was filed in the Superior Court on February 8, 1965 because it had not filed its annual report or paid its taxes last due. This complaint was a nullity and of no legal effect and did not constitute a valid cause of action. The Alaska Statute A.S. 09.10.240 therefore was not applicable under these circumstances. A contractual limitation provision under the fire insurance policy cannot be avoided by attempting to show that another action had been brought within the limitation provision and this would be particularly true when the other cause of action was void in its inception.

(infra 18-22)

IV

ARGUMENT

I

THE COURT PROPERLY DECIDED THAT THE LAWSUIT CONSTITUTED AN ACTION IN CONTRACT TO ENFORCE THE TERMS OF THE FIRE INSURANCE POLICY AND THAT THE FAILURE OF THE INSURED TO BRING AN ACTION WITHIN THE ONE YEAR LIMITATION PROVISION BARRED ANY RECOVERY IN THIS ACTION

The complaint in this action alleges as follows:

PARAGRAPH II

That on or about December 14, 1964, the plaintiff was the owner of a certain fire insurance policy on its inventory in its building at Barrow, Alaska. Said policy having been issued by Defendant and having the policy number of 343209. (R. 4)

PARAGRAPH IV

That Plaintiff notified Defendant of its loss under the terms of the aforementioned policy and Defendant undertook, through its agent, General Adjustment Bureau, the adjustment of the loss caused to Plaintiff by the fire. (R. 5)

PARAGRAPH V

That Defendant's policy aforementioned is in the sum of \$50,000.00. (R. 5)

PARAGRAPH VIII

That Plaintiff was informed of Defendant's refusal to pay Plaintiff anything under its policy for Plaintiff's loss on or about January 25, 1965 by Defendant and its agents. (R. 5)

An action for breach of a promise set forth in a contract is ex contractu but an action arising from the breach of a duty growing out of a contract is ex delicto. Peterson

vs. Sherman, 157 P.2d 863, 866 (Calif. 1945). The nonfeasance or failure to perform a contract affords no basis for a tort action which must show a breach of duty arising out of a contract to have been imposed by law and not by the contract itself. Sutker vs. Pennsylvania Insurance Company, 155 S.E.2d 694 (Ga. 1967).

Under the express terms of the insurance policy involved herein, lines 90 through 122 are appropriate:

Requirements in case loss occurs. The insured should give immediate written notice to this company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, cost, actual cash value and amount of loss claim;... the insured, as often as may be reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described,...and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost at such reasonable time and place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made. (R. 25)

The policy language quoted above makes it abundantly clear that the insured, not the adjuster, was obligated to furnish to the insurer a complete inventory list of the property destroyed or if none were available to obtain books of account, bills, invoices, etc., from its accountant or the merchandise suppliers and furnish these records to the insurer for verification of its claim for the value of the inventory destroyed by the fire. The adjuster's function

as the insurer's representative was to receive this information which the insured was obligated to furnish and to transmit the same with a proof of loss statement to the insurer for its rejection or acceptance.

As the Court in Otto vs. Imperial Casualty & Indemnity Company, 277 F.2d 889 (C.A.A. 8th Cir. 1960), stated in language appropriate to this action at page 893:

No harm independent of the contract is asserted. This is not a situation where the "tailor" has damaged the garment, but rather one where he has merely defaulted on his obligation to repair it.

This Court citing and quoting from the Missouri case, Kohnle vs. Paxton, 188 S.W. 155, 159 (Mo. 1916), continued as follows:

A tort is a wrong to another in his rights created by law or existence and consequences of a relation established by contracts, but it cannot be based upon the contract itself, or stated differently a duty imposed upon a landlord to make repairs does not arise out of the relation created by the contract, but rests upon an express stipulation in the contract. Being a duty assumed by the contract, its breach does not constitute a tort.

In the cases at bar, the petitions sound in tort, but they do not disclose such active negligence independent of a contract as will support an action of this character. In view therefore, of the strong trend of authority limiting the right of action in such cases to suits for breach of the contract, we feel impelled to hold that the plaintiffs had mistaken their remedy.

The Appellant in paragraph VI of the complaint alleges negligence on the adjuster's part for failure to establish the reasonable value of the goods lost by the insured which the contract provisions expressly state will be the obligation

of the appellant. The adjuster or representative of the insurer is authorized under the contract language to inspect and receive books or reports submitted by the insurer with the proof of loss statement together with any bills or invoices which would be transmitted to the insurer. The relationship between the insured and adjuster as well as the establishment of the reasonable value of the goods lost is based upon the express provisions of the insurance contract and not upon any duty imposed by law or active negligence independent of the contract itself. (R. 25)

Next, the insured employs the terms malicious, willful, reckless and intentional in the complaint in paragraphs VII, IX, X and XI. (R. 43-44) The insured also refers to the Alaska Statute A.S. 21.10.060 in paragraph IX of the complaint with specific reference to the insurance policy involved herein. (R. 44)

In the case of Moffet vs. Kansas City Fire & Marine Insurance Company, 244 P.2d 228 (Kan. 1952) there was an action on a fire policy. The insured refused to pay the amount claimed under the policy and the plaintiff alleged punitive damages in connection with his suit. The language of the Supreme Court of Kansas is appropriate to the instant case as set forth in its opinion on page 233:

The petition alleges no facts disclosing appellant willfully, wantonly, maliciously refused to pay the insurance. We have often said the use of such descriptive words, standing alone, is not a substitute for essential allegations



disclosing wanton and malicious conduct, and constitutes a mere conclusion by the pleader.

Mere refusal to pay insurance cannot constitute wanton and malicious conduct when as here an actual controversy exists with respect to liability on the policy.

The insured alleged in paragraph IX (R. 6) a violation of the Alaska Statute A.S. 21.10.060, which provides:

The department may refuse, suspend or revoke a certificate of authority after notice and hearing for any of the following causes:...

(3) compelling a claimant to accept less than the amount due under the policy or compelling a claimant to sue it to obtain full payment of a claim;...

The statute has no relevance to a contract or tort action between the insured and insurer since the express language of the statute concerns itself with the powers of the Department of Commerce over "foreign corporations" and has no relevance to civil suits between the insurer and the insured.

Furthermore, the great weight of authority holds that punitive damages are not available in an action for breach of contract. Brown vs. Coats, 253 F.2d 36 (D.C. Cir. 1958).

The Appellant cites the case of Crisci vs. Security Insurance Company of New Haven, Connecticut, 426 P.2d 123 (Cal. 1967), in support of its contention that this action sounds in tort rather than in contract. The Crisci case is a tort action. The bald statement by the Appellant that its allegations constitute a tort action is not established by citing the Crisci case which is definitely dissimilar to the

litigation involved here. The Appellant's attempt to allege a tort action certainly does not make it so. The Crisci case involved a suit on an excess judgment for the negligent failure of the insurance company to consider the insured's interest in negotiating a settlement within the policy limits with a third party who had commenced a suit against the insured for his negligent conduct.

Under the general liability insurance policies the insurer has an independent obligation to defend the insured and to exercise good faith in negotiating a settlement with the third party for claims made against the insured for which coverage is provided. The cases referred to by the Appellant in Keyton, Liability Insurance and Responsibility for Settlement, 67 Harv. L. Rev. 1136, 1138 n. 5 are certainly not relevant to the issues raised by this appeal nor are they applicable or related to the rights and obligations of the insured and insurer under the provisions of a fire policy as expressed therein. This is particularly true when the very provisions of the fire insurance policy involved herein placed the obligation on the plaintiff to furnish the proper inventory value by invoices, bills, books, etc., to establish a claim for the actual cash value of any of the inventory destroyed by the fire. This is not a suit involving a possible excess judgment for the failure of the insurer to properly defend or evaluate claims of damage by third parties which might result in a judgment in excess of the policy limits involved.

II

THE CONTRACT LIMITATION PROVISION IN THE FIRE INSURANCE POLICY GOVERNS ACTIONS IN CONTRACT OR TORT

In Alaska a contract limitation under an insurance policy requiring suit to be brought within a prescribed period of time, in the absence of a statute to the contrary, is valid, if reasonable, and the fact that the time fixed is shorter than the general statute of limitations does not invalidate the policy requirement. Sauer vs. Law, Union and Rock Insurance Company, 17 F.R.D. 430 (D.C. Alas. 1954). Similarly, this Circuit Court of Appeals has likewise held this contract limitation provisions to be enforceable. Blanton vs. Northwestern National Insurance Company, 335 F.2d 965 (9th C.A. 1964).

The fire insurance policy involved in this litigation had a contract limitation provision, lines 157-161, which provided:

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss. (R. 25)

The fire loss involved in this litigation occurred on December 14, 1964, (R. 4,14), and hence, the time for commencing any action or claim would be from the date the fire occurred.

Sager Glove Corp. vs. Aetna Insurance Company, 317 F.2d 439 (7th Cir. 1963); Proc vs. Home Insurance Company, 270 N.Y.S.2d 412 (N.Y. 1966).

Tort actions for personal injuries, as well as actions based upon either a contract or negligence suit can be subject to the enforcement of a contract time limitation provision involving the commencement of a lawsuit. Furr vs. Societa Ital. Transp. Marit. Genoa, Italy, 162 F. Supp. 645 (Dist. Ct. N.Y. 1958); Muse vs. Heime, 189 So.2d 840 (La. 1966).

The case involving facts and issues similar to the present action is that of Reece vs. Massachusetts Fire & Marine Insurance Company, 130 S.E.2d 782 (Ga. 1963) which involved a fire insurance policy with a contract limitation provision identical to the one before this court. The plaintiff, the mortgagee under the policy, sued the insurer alleging the failure of the insured to notify the mortgagee that the policy had expired. In the complaint the plaintiff alleged as one of its grounds that the insurer carelessly, negligently and without fault by the plaintiff, failed to give the ten days written notice of cancellation under the policy causing damage to the extent of the policy limits.

One of the grounds for the defendant's motion for dismissal pertained to the contract limitation provision under the fire insurance policy requiring the suit to be commenced within twelve months after the inception of the loss. The plaintiff realizing the problem involved with this clause in maintaining an action for breach of the contract attempted to circumvent this by labeling his complaint as an action

ex delicto attempting to invoke the statute of limitations pertaining to tort actions. This court rejected the plaintiff's attempt to circumvent this problem by holding that a contract limitation provision applies to both a contract and tort action wherein it stated at page 785:

However, as we view it, we do not think it at all necessary to decide whether the petition is ex contractu or ex delicto. It makes no difference. In either proceedings the valid stipulation of the contract limits the time within which the action may be sustained to twelve months after the loss. Every right claimed by the petitioner as mortgagee, as well as, every duty allegedly breached by the insurer, all evolve from the one source--the written contract of insurance. If there were any duty imposed on the insurer to notify the plaintiff in writing ten days before any cancellation of the policy; or to notify him of any failure or neglect of the mortgagor to pay premiums upon the renewal of the policy; or to notify and warn the mortgagee of the default of the mortgagor so as to enable the mortgagee to protect his interests, these duties could only have arisen under the provisions of the insurance policy...."Valid terms of the contract itself which limits the amount of damages for which the defendant will be liable, or require notice of a claim within a time limit or the like, are quite generally held to apply even though the action is in tort." (Prosser, *The Borderland of Tort and Contract*, Prosser Selected Topics on the Law of Torts, (1954) 445.)

It is readily apparent then that the suit filed by the appellant herein falls squarely within the holding of Reece, supra. The specific language of the limitation provision encompasses any claim, i.e., contract or tort arising between the insured or insurer under the fire insurance policy.

Without this fire insurance policy the rights and obligations of the parties could not exist nor could any duty be imposed by law. There appears then to be no logical or valid reason why the one-year time suit provision should not be applied to both contract and tort actions.

The fire insurance policy No. IFP 343209 was a standard one known as the 1943 Edition, New York standard fire insurance policy. (R. 24-25,31-33) This standard form was adopted for use under the Alaska law. See the 1959 Session Laws of Alaska, Ch. 182 §3(a), codified A.S. 21.25.030, repealed by S.L.A. 1966, Ch. 120 §1. The appropriate language of the Alaska statute pertaining to the standard fire policy in full force and effect when this fire loss occurred on December 14, 1964 provided as follows:

Section III. Standard Fire Policy (a) The standard fire insurance policy known as the 1943 Edition, New York standard form of fire insurance policy, and any changes made thereto made subsequently and approved by the commissioner is hereby adopted as the standard form of fire insurance policy for Alaska.... All such 1943 New York standard form of fire insurance policies issued or outstanding in Alaska from and after said date until such time as the commissioner otherwise rules, shall be valid....

It has been held in numerous cases involving the 1943 New York standard fire policy that the time to sue under a contract limitation provision or under the Statute of Limitations commences to run from the date of the fire loss. Margulies vs. Quaker City Fire & Marine Insurance Company, 97 N.Y.S.2d

100 (N.Y. 1950); Bell vs. Quaker City Fire & Marine Insurance Company, 370 P.2d 219 (Ore. 1962); Ramsey vs. Home Insurance Company, 125 S.E.2d 201 (Va. 1962), 95 A.L.R.2d P.1019.

The Alaska Statute A.S. 09.10.070 entitled Actions to be Brought in Two Years provides as follows:

No person may bring an action (1)...or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise...unless commenced within two years.

The statutory language above "not arising on contract and not specifically provided otherwise" would seem to recognize the contract right to limit the time for suit in a contract or tort action, or alternatively to recognize the legislative mandate, under A.S. 21.25.030 adopting the New York fire insurance policy, and the case authorities interpreting the same, that the date of the fire loss determines when the cause of action commences. It is undisputed that the fire loss occurred on December 14, 1964. (R. 4) The Appellant's complaint filed in this litigation was dated January 17, 1967. (R. 7) This then was more than two years after the date of the fire loss and would bar recovery in this action even without the enforcement of the specific contract limitation provision in the insured's policy.

III

UNDER THE ALASKA LAW THE PLAINTIFF'S COMPLAINT FILED FEBRUARY 8, 1965 WAS A NULLITY AND OF NO LEGAL EFFECT, AND THE

COURT PROPERLY FOUND THAT THE CONTRACTUAL
LIMITATIONS WERE THEREFORE ENFORCEABLE
AGAINST THE COMPLAINT FILED ON JANUARY
17, 1967

The Appellant claims that the provisions of the fire insurance policy were tolled when it filed a complaint on February 8, 1965 in the Superior Court for the State of Alaska, Cause No. 65-181 B. (R. 39) This matter was dismissed on the defendant's motion on June 13, 1967. (R. 40-41)

The general rule is that the defense of a statute of limitations applicable to a particular action where it is plead cannot be avoided by showing that another action had been brought within the time period allowed by the statute. Steinour vs. Oakley State Bank, 287 P. 949 (Idaho 1930). This case had a saving statute similar in its wording to the Alaska Statute A.S. 09.10.240 hereinafter set forth; Barr vs. Carroll, 274 P.2d 717 (Cal. 1954); Crow vs. City of Lynwood, 337 P.2d 919 (Cal. 1959).

Therefore, since the contractual limitation provisions are valid and enforceable, even though the time limit prescribed for commencing the suit is shorter than that specified in the statute, then by analogy the complaint filed on February 8, 1965 (which was invalid) cannot be pleaded or referred to for purposes of avoiding enforcement of the contractual limitation provisions involved in this litigation.

The appellant then cites the Alaska Statute A.S. 09.10.240 in support of the contention that it was then entitled

to commence a new action within one year after the dismissal date aforementioned. The language of the statute provides as follows:

If an action is commenced within the time prescribed and is dismissed upon the trial or upon appeal after the time limited for bringing a new action, the plaintiff or, if he dies and the cause of action in his favor survives, his heirs or representatives may commence a new action upon the cause of action within one year after the dismissal or reversal on appeal. All defenses available against the action, if brought within the time limited, are available against the action when brought under this provision.

The statutory language of A.S. 09.10.240 presupposes that a valid cause of action was filed under the Laws of Alaska before this provision becomes applicable. As will hereinafter be shown the complaint filed on February 8, 1968 was a nullity and of no legal effect under the law of Alaska.

The law holds that whenever a complaint is not based upon a proper or valid cause of action the running of the statute of limitations is not interrupted or tolled. Bortho vs. Polish Natl. Alliance of the U.S. of North America, 119 P.2d 536 (Kan. 1941); Marks vs. St. Francis Hospital and School of Nursing, 294 P.2d 258 (Kan. 1956).

Furthermore, in order for a complaint to be valid the party must have the right to sue at the time the complaint is filed. Jorgensen vs. Baker, 157 N.E.2d 773 (Ill. 1959) Cert. Den. 80 Sup. Ct. 590, 361 U.S. 962, 4 L.Ed.2d 543.

The Alaska Supreme Court in the case of Alaska Mines and Minerals, Inc. vs. Alaska Industrial Board, 354 P.2d 376 (1960) at page 377 cites a portion of the Alaska Business Corporation Act which reads as follows:

No corporation, foreign or domestic, shall be permitted to commence or maintain any suit, action or proceeding in any court in Alaska without alleging and proving that it has paid its annual corporation tax last due calendar or fiscal year for which such report became due for filing. (A.S. 10.05.720)

In this case there was a suit by a corporation for an injunction to set aside and restrain the enforcement of an award of the Industrial Board. The complaint was dismissed and the corporation appealed. The Supreme Court held that the Alaska Statute prohibited the corporation from commencing or maintaining a suit in any court without alleging and proving that it had paid its annual taxes or filed an annual report as required by law. The court reasoned as follows on page 379 of its opinion:

The attempt to commence a proceeding in court, when the law provides that this may not be done, logically is the commencement of no proceeding at all. An act which is prohibited can have no legal effect merely because it is done.

The running of the time within which injunction proceedings might have been instituted was not suspended between the date that appellant filed its complaint and the date that it paid its tax...Unless a new action is commenced within the applicable period of limitation, the right is barred. Similarly, compliance with the law after a statute of limitations has run does not serve to validate from its inception an action which had no validity or legal effect at the time it was commenced.

The plaintiff's complaint filed on February 8, 1965 did not allege that the corporation had paid its annual taxes and filed its annual report as required under the Alaska law. (R. 39) The memorandum decision of the Superior Court Judge shows that the plaintiff was not qualified to commence its suit filed on February 8, 1965 and the matter was dismissed under the authority of the Alaska Mines and Minerals case, supra. (R. 40-41)

Thus, under Alaska law the plaintiff's complaint filed on February 8, 1965 was a nullity and of no legal effect. The provisions of A.S. 09.10.240 are therefore inapplicable. The contract limitation provision for commencement of a suit properly bars either a contract or tort action based upon the complaint filed on January 17, 1967 which was approximately two years and one month after the fire loss occurred.

CONCLUSION

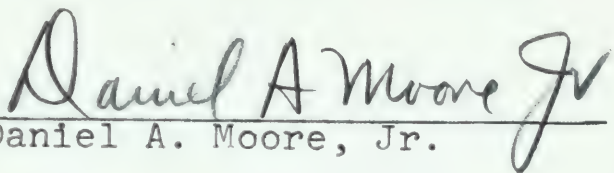
Based upon the authorities and reasons hereinabove set forth the judgment of the United States District Court should be affirmed.

By Daniel A. Moore Jr.
Daniel A. Moore, Jr.

DATED: August 16, 1968
Anchorage, Alaska

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


Daniel A. Moore, Jr.

NO. 22,791

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BARROW DEVELOPMENT COMPANY, INC.,)

Appellant,)

v.)

THE FULTON INSURANCE COMPANY,)

Appellee.)

SEP 8 1958

FILED

SEP 9 1958

WM. B. LUCK, CLERK

APPELLANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

JOHN M. SAVAGE

Savage, Erwin & Curran
825 West Eighth Avenue
Anchorage, Alaska

Attorneys for Appellant

SUBJECT INDEX

Page

Table of Authorities Cited	ii
Summary of Argument	1
Argument	2
I. THIS ACTION, LIKE <u>CRISCI V. SECURITY</u> <u>INSURANCE CO.</u> , SOUNDS IN TORT; THEREFORE THE ONE YEAR CONTRACT LIMITATION ON TIME TO BRING SUIT ON THE POLICY WAS NOT APPLICABLE TO THE PRESENT ACTION	2
II. THE CONTRACT LIMITATION IN THE INSURANCE POLICY CANNOT GOVERN THE TIME FOR BRINGING AN ACTION BASED ON A DUTY COMPLETELY INDEPENT OF THE TERMS OF THE CONTRACT	3
III. IF THE PRESENT ACTION SOUNDS IN CONTRACT, IT WAS TIMELY, SINCE THE LIMITATION PROVISION IN THE POLICY WAS TOLLED BY THE FILING OF PLAINTIFF'S COMPLAINT FEBRUARY 8, 1965	4
Conclusion	8
Certificate	9

TABLE OF AUTHORITIES CITED

CASES

Page

Alaska Mines and Minerals, Inc., v. Alaska Industrial Board, 354 P.2d 376 (1960) 1, 6, 7

Barr v. Carroll, 274 P.2d 717 (California 1954)4, 5

Comunale v. Trader & General Insurance Co., 328 P.2d 198 (California 1958) 2

Crisci v. Security Insurance Company of New Haven, Connecticut, 426 P.2d 173 (California 1967)2

Jorgensen v. Baker, 157 N.E.2d 773 (Illinois 1959)5

Reece v. Massachusetts Fire & Marine Insurance Company, 30 S.E.2d 782 (Georgia 1962) 3

Roth v. Northern Assurance Company, 203 N.E.2d 415 (Illinois 1964)5

STATUTES

A. S. 09.10.070 4

A. S. 09.10.2401, 6

A. S. 21.10.060 3

SUMMARY OF ARGUMENT

Argument No. 1

Appellant asks this Court to apply the rule that an insurance company owes its insured a duty of good faith and fair dealing completely independent of the provisions of the policy and hold that the contractual limitations on time to bring suit are therefore irrelevant.

Argument No. 2

This argument refutes appellee's contention that the contractual limitation of time should apply even if the present action sounds in tort.

Argument No. 3

This argument shows that, even if this action sounds in contract, the contractual limitation of time to bring suit was tolled by the filing of plaintiff's suit February 8, 1965, since the Alaska Mines and Minerals case is readily distinguishable and A.S. 09.10.240 provides a period in which suits dismissed not on the merits may be brought again.

ARGUMENT

I. THIS ACTION, LIKE CRISCI V. SECURITY INSURANCE CO., SOUNDS IN TORT; THEREFORE THE ONE YEAR CONTRACT LIMITATION ON TIME TO BRING SUIT ON THE POLICY WAS NOT APPLICABLE TO THE PRESENT ACTION.

If appellee is to prevail in this Court, it must distinguish the present case from Crisci v. Security Insurance Company of New Haven, Connecticut, 426 P.2d 173 (California 1967). This it has failed to do.

Crisci involved a somewhat different factual situation -- as counsel for appellee has pointed out -- but the underlying legal problem is the same. What obligation does an insurance company owe its insured outside the terms of the policy? The Court in Crisci (citing Comunale v. Trader & General Insurance Co., 328 P.2d 198 (California 1958)) stated:

" . . . that in every contract, including policies of insurance, there is an implied covenant of good faith and fair dealing that neither party will do anything which will injure the right of the other to receive the benefit of the agreement . . . " 426 P.2d 173, 176 (Emphasis added.)

It is the breach of this implied covenant of good faith and fair dealing for which appellant seeks recovery. It was for the breach of this covenant that the plaintiff in Crisci sued in tort and won.

ARGUMENT

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It is the breach of this implied covenant of good faith and fair dealing for which appellant seeks recovery. It was for the breach of this covenant that the plaintiff in Crisci sued in tort and won.

Appellee insists that this is a poorly disguised contract action. That simply is not so. In the contract action now pending in the Alaska courts, plaintiff need only show existence of the contract, satisfaction of the conditions precedent, and defendant's failure to perform. In this action plaintiff must show, in addition to the foregoing, that defendant defaulted on its obligation of good faith and fair dealing. A.S. 21.10.060 (cited on page 12 of appellee's brief) should be informative as to the extent of that obligation.

II. THE CONTRACT LIMITATION IN THE INSURANCE POLICY CANNOT GOVERN THE TIME FOR BRINGING AN ACTION BASED ON A DUTY COMPLETELY INDEPENDENT OF THE TERMS OF THE CONTRACT.

Appellee suggests that Reece v. Massachusetts Fire & Marine Insurance Company, 30 S.E.2d 782 (Georgia 1962), presented facts and issues similar to this case. Appellant suggests that this is not quite true. In Reece plaintiff tried to allege a tort action based on the insurance company's failure to give the written notice of cancellation required by the terms of the policy. The Court held that since the defendant's duty to give written notice "could only have arisen under the provision of the insurance policy . . . " (130 S.E.2d 782, 785), plaintiff was bound by the twelve month contractual limitation. The present case does not

arise under the provision of the policy, but quite independently. Since plaintiff does not base its action on the provisions of the policy, it is difficult to see the logic in the application of a term in the policy to bar the action.

Appellee then puts forth the suggestion that appellant failed to bring its action within two years (as required by A.S. 09.10.070). This contention is without merit; this suit was filed January 17, 1967 -- less than two years after the actions complained of. Paragraph VIII of the complaint alleges:

"That plaintiff was informed of defendants refusal to pay plaintiff anything under its policy for plaintiff's loss on or about January 25, 1965 by defendant and its agents."

The complaint was filed less than two years later.

III. IF THE PRESENT ACTION SOUNDS IN CONTRACT, IT WAS TIMELY, SINCE THE LIMITATION PROVISION IN THE POLICY WAS TOLLED BY THE FILING OF PLAINTIFF'S COMPLAINT FEBRUARY 8, 1965.

Appellee cites cases to the effect that a statute of limitations defense "cannot be avoided by showing that another action had been brought within the time period allowed by the statute". Appellee's brief at page 19.

Although only one case (Barr v. Carroll, 274 P.2d 717 (California 1954)) of the three cited stands for the proposition, appellant will accept it arguendo. If it is

true that this action is a contract action, then the proposition is irrelevant, since then it is the same action (within the meaning of Barr v. Carroll, supra) as the one filed February 8, 1965. If, on the other hand, this action is a completely separate tort action (as appellant strongly urges it is), then the proposition is again irrelevant, since, as we have seen before, the limitations period under discussion applies only to actions arising from the terms of the contract.

The appellee then cites two Kansas cases for the proposition that a complaint which fails to state a cause of action does not toll the statute of limitations. That seems reasonable enough, but in this case appellant has never suggested that the complaint filed February 8, 1965, failed to state a cause of action.

Appellee next cites Jorgensen v. Baker, 157 N.E.2d 773 (Illinois 1959). Appellant concedes that this case is in point, but suggests that the less formalistic -- but infinitely more rational -- decision of the Illinois Supreme Court (Jorgensen was decided by a lower level appellate court) in Roth v. Northern Assurance Company, 203 N.E.2d 415 (Illinois 1964), should be of greater interest to this Court. In that case plaintiff sued five fire insurance companies in a federal

district court, and sometime more than twelve months after the loss occurred, the case was dismissed for want of the requisite jurisdictional amount. The insurance companies then defended against plaintiff's attempt to sue them in the state court on the grounds that the action was barred by the contractual limitations period. The Illinois court dismissed this contention on the ground that the saving statute, very similar to A.S. 09.10.240, set out on page 14 of appellant's opening brief, being remedial in nature must be liberally construed so as to protect appellant's right to a trial on the merits of his case. This Court should do the same.

Appellee cites the early Alaska Supreme Court case of Alaska Mines and Minerals, Inc., v. Alaska Industrial Board, 354 P.2d 376 (1960), as holding that a corporation not in good standing cannot bring a suit in any court, and then concludes that ". . . under Alaska law the plaintiff's complaint filed on February 8, 1965 was a nullity and of no legal effect." Appellee's brief at page 22.

Appellee's major premise is the unstated assumption that the facts of the two cases are reasonably alike. This simply is not so.

Alaska Mines and Minerals was 1) in appellee's

words, ". . . a suit by a corporation for an injunction to set aside and restrain the enforcement of an award of the Industrial Board." (Appellee's brief at page 21); 2) in plain English, an appeal from a Workmen's Compensation Board decision. This is one major difference. In Alaska Mines and Minerals, but not in the present case, there was a full hearing on the merits. In Alaska Mines and Minerals, but not in this case, there was no element of litigation by ambush. The Fulton Insurance Co. in the present case waited more than two years (after making full use of discovery procedures and obtaining a trial setting) to raise the question of the appellant's corporate standing; in Alaska Mines and Minerals the motion to dismiss was made in less than twenty days. In Alaska Mines and Minerals the lower court dismissed the appeal ("complaint") with prejudice; in this case the complaint was dismissed without prejudice. The appellee has cited the Superior Court's decision, and the reason therefor (appellee's brief at page 22), but has failed to point out the obvious implication: that the Supreme Court's decision in Alaska Mines and Minerals does not require that the Superior Court (or this Court, or any other) take the language of that case literally. Fulton Insurance Company did not appeal Judge Fitzgerald's decision of June 13, 1967.

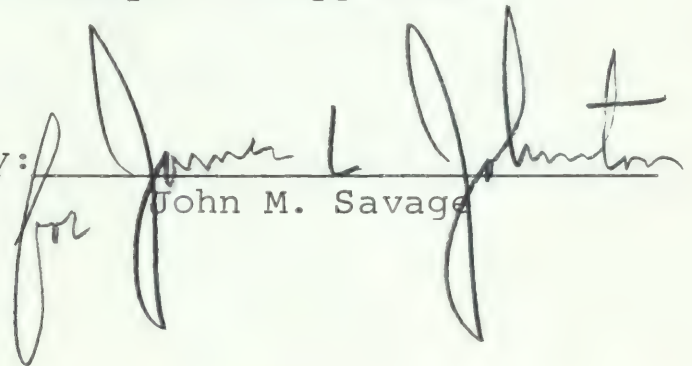
CONCLUSION

For the foregoing reasons as stated in the arguments in the body of this brief, the United States District Court for the District of Alaska erred in granting the Fulton Insurance Company's motion for summary judgment, and the judgment should be reversed and the United States District Court for the District of Alaska should be instructed to proceed to hear plaintiff-appellant's cause of action.

DATED this 5th day of September, 1968.

SAVAGE, ERWIN & CURRAN
Attorneys for Appellant

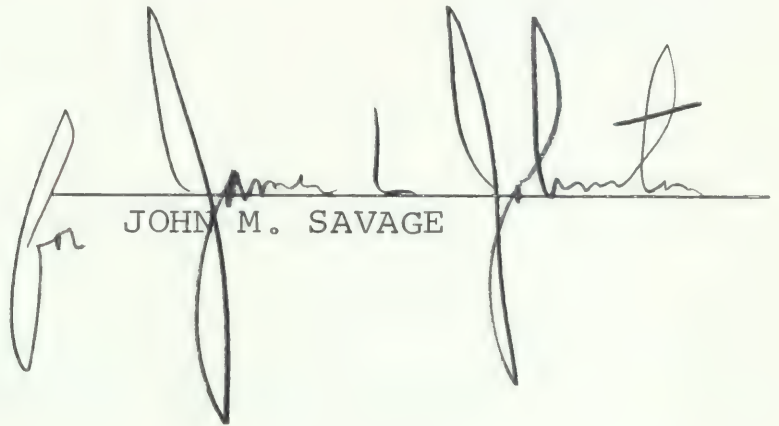
By:

A handwritten signature in dark ink, appearing to read "John M. Savage", is written over a horizontal line. To the left of the signature, the word "for" is written in a cursive script.

John M. Savage

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined revised Rule 18 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with the rules.



JOHN M. SAVAGE

NO. 22,753

UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

THEODOSIOS THEODORES TZANFARMAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the Judgment of the United States
District Court for the District of Oregon

RESPONDENT'S BRIEF

SIDNEY I. LEZAK
United States Attorney
District of Oregon

RICHARD C. HELGESON
Assistant United States Attorney

FILED

JUL 18 1968

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CONTENTS

	Page
Counter-Statement of Facts	1
Falsity of Defendant's Representation That He Was Not Previously Married.	8
Argument	10
Conclusion	14

CASES CITED

Brandow v. United States (C.A. 9, 1959), 268 F.2d 559-656.	11
---	----

RULES INVOLVED

Federal Rules of Civil Procedure	
Rule 44	12, 13
Federal Rules of Criminal Procedure	
Rule 23	10
Rule 27	11

NO. 22,798

UNITED STATES

COURT OF APPEALS

FOR THE NINTH CIRCUIT

THEODOSIOS THEODORES TZANTANIAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the Judgment of the United States

District Court for the District of Oregon

RESPONDENT'S BRIEF

COUNTER-STATEMENT OF FACTS

Defendant, Theodosios Tzantarmas, a twenty-eight year old Greek seaman, appeared at the office of the Immigration and Naturalization Service at Portland, Oregon on February 25, 1964 (Gov. Ex. 3, p. 9), and the official Immigration file relating to him contains an entry made February 25, 1964, by Immigration Investigator Alfred G. Neumann as follows:

"The subject and his spouse came to this office and inquired as to how he might adjust his status." (Tr. 35)

Defendant was interviewed by Mr. Neumann under oath, and his statement was transcribed by Angeline Kanan, the official Immigration stenographer. As the defendant did not speak English, his statement was translated by an interpreter, Bill Asperos (Gov. Ex. 3).

The transcript of defendant's statement was introduced and received at the trial as Government Exhibit 3. It reflects that defendant was born at Thessalonica, Greece, and that on January 30, 1964, he was a seaman aboard the Greek vessel Ionian Challenger when that vessel paid a two-day call to Philadelphia, Pennsylvania (Gov. Ex. 3, p. 3).

Defendant left his ship on January 30, 1964, to see a doctor for a stomach illness (Gov. Ex. 3, p. 3). Defendant testified that he intended to depart with the ship (Gov. Ex. 3, p. 4). However, the ship departed without him, and defendant, when asked why he did not depart with the ship, answered

"Because I was ill and I was sent to the doctor."
(Gov. Ex. 3, p. 4)

Defendant testified that when he came back from the doctor, the ship was missing (Gov. Ex. 3, p. 5).

Instead of reporting to Immigration authorities in Philadelphia, defendant left Philadelphia by bus the following day and travelled directly to Portland, Oregon, arriving three and a half days later (Gov. Ex. 3, p. 5). There he made contact with Alice Paulson, a girl he had met in Portland during a previous visit and married her at Vancouver, Washington, on February 7, 1964, one week after leaving his ship (Gov. Ex. 3, p. 6).

When asked why he came to Portland, defendant replied:

"I didn't have any place much to go and I had met a young lady here in Portland while I was ill, so I decided to come here." (Gov. Ex. 3, p. 4)

When asked when he decided to get married here, defendant replied:

"As soon as I came back and reunited with this friend of mine I had met at the Good Samaritan Hospital."

The following questions were asked and answers given by defendant:

"Q Have you ever been married at any time previously?

A No.

Q Has your wife ever been married at any time previously?

A No.

Q Are you living with your wife at the present time?

A Yes.

Q Do you support your wife in any way?

A I am not working at the present." (Gov. Ex. 3, pp. 6-7)
[Emphasis added.]

The defendant's statement just quoted that he had never been previously married at any time was one of the false statements charged in the information upon which defendant was convicted in this case.

After obtaining the foregoing information from defendant,

Investigator Neumann advised the defendant on February 25, 1964 as follows:

"Your wife will be permitted to file a visa petition in order to accord you nonquota status, but you must make arrangements to secure your immigration visa from an American Consul outside the United States. Since you are married to a citizen of the United States, the District Director is disposed to allow you a reasonable length of time, say, thirty days, in which to make arrangements to leave the United States." (Gov. Ex. 3, p. 7)

Two days later, on February 27, 1964 (and twenty days after defendant's purported marriage to Alice Paulson), defendant appeared in a formal deportation hearing before Special Inquiry Officer John W. Keane in Portland. At this hearing the testimony of defendant was again transcribed by the official stenographer, Angeline Kanas, and translated

by the Interpreter, Bill Asperos (Gov. Ex. 4). The transcript of the testimony of defendant at this hearing was introduced by the Government as Government Exhibit 4. At the hearing defendant admitted he was illegally in the United States and subject to deportation (Gov. Ex. 4, p. 4). At this point, Special Inquiry Officer John W. Keane advised the defendant as follows:

"A voluntary departure is a form of relief from deportation and it is available to persons who can establish that they would be able to depart from the United States promptly to the country of their choice and pay their own way and show that they have been a person of good moral character during the last five years." (Gov. Ex. 4, p. 4)

After so advising defendant, the Inquiry Officer, Mr. Keane, asked defendant:

"Now, under the circumstances, do you desire to apply for voluntary departure?"

to which defendant answered:

"Yes, as long as it is a place which is close to the United States." (Gov. Ex. 4, p. 4)

Present with defendant in the hearing room at the time of the foregoing exchange was Alice Paulson whom defendant identified as his wife (Gov. Ex. 4, p. 5).

At that point in the hearing, Alice Paulson was asked to leave the hearing room and the defendant was examined as to his marital status.

Mr. Keane asked:

"Q How many times have you been married?

A Once, which is now.

Q And your testimony is that you were not married in Greece?

A Yes." [Emphasis added.]

The foregoing representation he had been married just one and had

not been married in Greece was the second false statement with which defendant was charged in the Information in this case.

After stating that he had never been married before, defendant made the following explanation as to his marriage to Alice Paulson: He met Alice Paulson about a year previously at a Portland hospital where she was a Nurse's Aid. He was in the hospital about a month and thereafter left for Greece where he corresponded with her frequently. Alice Paulson does not speak Greek, and defendant stated that he did not speak English "too good" (Gov. Ex. 4, p. 8). When defendant arrived at Portland during the first week in February, 1964, he did propose marriage to Alice Paulson (Gov. Ex. 4, p. 9). When asked how he had conversed with his wife, he replied, "God only knows." (Gov. Ex. 4, p. 8) Defendant stated that he had given Alice Paulson no gifts and bought her no furniture. He was, at the time of the deportation hearing, living at her apartment in Portland (Gov. Ex. 4, p. 11). He did not know the amount of rent the apartment cost. He had no money or property other than about \$120.00 (Gov. Ex. 4, p. 12).

When defendant was asked his purpose in getting married, he stated that he loved Alice Paulson and that they intended to

"proceed to whatever the law of the land said. If I could not stay in this country, I was prepared to take her to Greece with me." (Gov. Ex. 4, p. 14)

He admitted that he had not discussed any of these problems with Alice Paulson before they were married (Gov. Ex. 4, p. 14). He was evasive and refused to either admit or deny that he had told Alice Paulson that he was illegally in the country (Gov. Ex. 4, pp. 14-15).

At the deportation hearing defendant asked for information about

voluntary departure:

"WIT: I wish to request for voluntary departure.

Q How soon can you go?

A If you would give me one month--one month's time." (Gov. Ex. 4, p. 14)

At this point, Mr. Keane advised the defendant as follows:

"Now, I am not prepared to state at this time concerning your marriage. Whether your wife wishes to petition for you, whether the marriage is bona fide, is a thing I don't know yet * * *

Following this, Alice Paulson was examined in the presence of the defendant whom she had identified as her husband. She described her meeting him at Good Samaritan Hospital the year previous where she was working as a Nurse's Aid (Gov. Ex. 4, p. 18). She said that defendant did not propose marriage to her at that time (Gov. Ex. 4, p. 19). Defendant called Alice Paulson from Philadelphia and they decided to be married three and a half days later, the day the defendant arrived in Portland (Gov. Ex. 4, p. 21). At the time they were married, the defendant had not told Alice Paulson he was illegally in the United States (Gov. Ex. 4, p. 24). When Alice Paulson was asked about prior marriages of herself and her husband, she testified as follows:

"Q Have you been married previously?

A No, I haven't.

Q To your knowledge has your husband been married previously?

A No." . [Emphasis added.]

This statement was made in the presence of defendant. (Gov. Ex. 4)

Mr. Keane then asked about defendant's obtaining money for voluntary

departure, entered findings that defendant was deportable and offered defendant an opportunity to earn transportation if he wished to have voluntary departure (Gov. Ex. 4, p. 27). The hearing officer's official findings dictated at the close of the hearing in the presence of both defendant and Alice Paulson include the following:

"There is nothing in the record to indicate that the respondent married his wife solely for the purpose of obtaining the advantage of the immigration laws. There is nothing here to indicate that the marriage was not a bona fide legal marriage. * * * A sole barrier to respondent's establishing statutory eligibility for voluntary departure is the fact that he does not have sufficient money to defray the cost of his transportation to Greece. * * *"

[Emphasis added.]

February 28, 1964, the day following the deportation hearing, Alice Paulson filled out and filed with the Portland Office of the Immigration and Naturalization Service Form I-130, a petition to modify status of alien relative for issuance of an immigrant's visa (Gov. Ex. 2(a)). In this petition, Alice Paulson stated the following:

"Number of prior marriages of spouse - None."

The petition was approved on April 13, 1964 (Gov. Ex. 2(a)).

Defendant voluntarily returned to Greece shortly after the deportation hearing, and on June 8, 1964 he filed an application for immigrant visa and alien registration with the American Embassy in Athens, Greece (Gov. Ex. 2(a)). In this application, defendant stated as follows:

"Including my present marriage, I have been married one times." (Gov. Ex. 2(a)) [Emphasis added.]

Defendant gave the name and address of his wife as Alica Tzantarmas, Portland, Oregon (Gov. Ex. 2(a)).

When asked to give the names and addresses of his children under twenty-one years of age, he stated: "Tom."

Defendant attached to his application for immigrant visa a copy of the petition to modify status which had been filed the day after his deportation hearing by Alice Paulson at Portland (Gov. Ex. 2(a)), in which Alice Paulson stated that defendant had no prior marriages. He also attached an affidavit from Alice Paulson in which Alice Paulson stated as follows:

"I was married to Theodosios Triantafidis from Pyraei, Greece, this being the first marriage for both of us." (Gov. Ex. 2(a)) [Emphasis added.]

The cost of the trip, paid for by Alice Paulson, was about \$1,200.00. Alice Paulson's yearly income as a Nurse's Aid at that time was \$3,180.40 (Gov. Ex. 2(a)).

As a result of his claim of marriage to Alice Paulson, defendant was granted a visa to return to the United States permanently as a nonquota alien. He was admitted in New York on June 22, 1964 (Gov. Ex. 2(a)).

FALSITY OF DEFENDANT'S REPRESENTATION
THAT HE WAS NOT PREVIOUSLY MARRIED

The falsity of defendant's statements that he had not been previously married is not in dispute. It is admitted that on July 10, 1955, in his home town of Thessalonica, Greece, defendant married one Theodora Mytelensis by whom he had a daughter who is now twelve years of age (Appellant's Opening Brief, pp. 1-3). In fact, defendant later obtained entry into the United States for his Greek daughter, and she is now living with him in Portland, Oregon (Appellant's Opening Brief, p. 4).

Defendant was married to his Greek wife, Theodora Mytelanois, at the time all of the events referred to above transpired; that is, at the time of his jumping ship at Philadelphia, his purported marriage to Alice Paulson, his visits to the Immigration Service at Portland, his return to Greece, and his application for entry into the United States as a nonquota alien.

Defendant's Greek divorce decree was entered at Thessalonica, Greece, on June 1, 1964: this was four months after defendant purported to marry Alice Paulson, seven days before he filed in Greece his application for nonquota status and about three weeks before he returned to the United States as the purported husband of Alice Paulson (Def. Ex. 11). A certified copy of the decree of divorce entered in Greece offered by the defendant as an exhibit at the trial shows that the divorce case came on for hearing as the result of a summons issued by Tzantarmas himself (who was the plaintiff in the divorce suit) on April 13, 1964, which was just after his return to Greece upon voluntary departure from the United States (Def. Ex. 11). The decree recited that Tzantarmas and his Greek wife were married July 10, 1955, and had one female child, nine years of age at the date of the decree (Def. Ex. 11). The decree recited that the parties lived together in Greece until June 1960, when the Greek wife took up residence with her parents. In the decree Tzantarmas was awarded a default divorce against his Greek wife, plus expenses and attorney's fees (Def. Ex. 11). Seven days later, when he filed his application for immigrant visa, defendant was asked in question 10 whether he was "married, divorced, widowed, or separated." He checked "married" and stated, "Including my present marriage, I have been married one time."

When asked the names and addresses of his children under twenty-one years of age, he stated, "None." (Gov. Ex. 2(c)).

ASSIGNMENT

Defendant's first assignment of error is that the Court failed to enter a finding as to whether defendant's answers were "exculpatory no" answers.

Rule 23 of the Federal Rules of Criminal Procedure requires that the Court make a "general finding" and that it

"shall in addition on request find the facts specially." [Emphasis added.]

At trial, defendant's counsel argued that defendant's claims that he was not married in Greece were "exculpatory no" statements, but at no time did he ask the Court to make a special finding on this point. In any event, since the issue presented is one of law, not fact, it would have been discretionary with the Court to enter such a finding even if requested. In the Court's Opinion dated February 24, 1968, the trial judge indicated that he had read the authorities cited by the defendant and that he decided this issue against defendant:

"I have examined the authorities cited by the parties.
The cases cited by the defendant are not in point . . ."
(Opinion of Court, p. 2)

Defendant's second assignment is that the Court erred in denying defendant's motion for judgment of acquittal. This motion was argued briefly at the time it was made and in support of it defendant's counsel urged that the false statements made by defendant were not material. The Court found that they were material (Tr. p. 30). This finding was entirely

consistent with the evidence and in line with appellate holdings on the question of the required materiality of false statements for the purpose of prosecutions under 18 U.S.C. § 1001. This Court, for example, in Brandow v. United States (C.A. 9, 1959), 268 F.2d 559-656, announced the rule that a false statement is material under 18 U.S.C. § 1001 if it is

" . . . calculated to induce agency reliance or action, irrespective of whether actual favorable agency action was, for other reasons, impossible."

In the present case defendant and Alice Paulson appeared at the Immigration Office at Portland on February 27, 1964, and represented that they were married. They both denied that defendant had ever been married previously. As a result of this representation, defendant was permitted voluntary departure to Greece, he was permitted to and did file an application for nonquota alien status, his application was allowed, and he was permitted to re-enter the United States as the purported husband of Alice Paulson, where he has resided ever since. Thus, important agency action was both requested and granted based upon defendant's false denial of his Greek marriage.

Defendant's final assignment of error is that the Court should not have received Government Exhibits 1, 5, 2 and 2(a).

Government Exhibit 1 is a certificate dated October 12, 1967 of the Bishop of Thessalonica, Greece, stating that defendant was married July 10, 1955 in the Holy Church of St. John Chrysostomos at Thessalonica to Theodora Mytilenois in accordance with the rituals of the Eastern Orthodox Church of Christ by the priest Andreas. The certificate recites that this marriage was dissolved by civil divorce decree dated June 1, 1964 (four months after defendant's marriage to Alice Paulson) by the

Thessalonian Court of First Instance and by a decree of religious divorce issued December 27, 1963 (eleven months after defendant's marriage to Alice Paulson). The certificate of the Bishop is authenticated by a certificate of James H. Norton, United States Consul at Thessalonica, Greece dated November 9, 1967. At the trial, defendant's counsel objected to the introduction of Government's Exhibit 1 upon the ground that

"It's an extract and not a record." (Tr. p. 9)

Rule 44 of the Federal Rules of Civil Procedure made applicable by Rule 27 of the Federal Rules of Criminal Procedure provides that if reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of a foreign document, the Court may

"permit the foreign official record to be evidenced by an attested summary with or without a final certification."

It is therefore clear that Government Exhibit 1 complied with the formal requirements of Civil Rule 44. Furthermore, its admission could not have prejudiced defendant as both the fact of his Greek marriage and of his Greek divorce were admitted. Reference to them may be found in Defendant's Exhibit 11. Defendant's Exhibit 11 contains a copy of defendant's Greek divorce decree and that decree itself recites the existence and date of defendant's Greek marriage.

Government Exhibit 5 is a copy of defendant's Greek divorce decree of June 1, 1964 (also introduced by defendant himself as Defendant's Exhibit 11). Defendant's counsel at the trial objected to the introduction of Government Exhibit 5 on the grounds of materiality and relevancy, and also objected that there was no showing that defendant was

the person named in the Greek divorce decree (Tr. p. 8). It is clear that the divorce decree properly authenticated by the United States Vice-Consul was admissible under Civil Rule 44 and could not have been prejudicial to defendant inasmuch as he himself introduced a copy as Defendant's Exhibit 11.

The materiality of the divorce decree lies in the fact that its date, June 1, 1964, falls some four months after defendant's purported marriage to Alice Paulson on February 7, 1964, which second marriage provided the basis for his voluntary departure and acceptance into this country as a nonquote alien.

Government Exhibit 2 is a copy of a certificate dated at Vancouver, Washington, February 7, 1964, evidencing the purported marriage between defendant and Alice Paulson. It is signed by defendant and Alice Paulson and by Alice Paulson's parents. Defendant's counsel's objection to the introduction of the marriage license was on the ground that it was a copy rather than the original. However, the fact of defendant's purported marriage to Alice Paulson at Vancouver, Washington, on February 7, 1964, is not in dispute (Tr. p. 56; Appellant's Opening Brief, p. 3). Defendant himself did not take the stand to deny the existence of this marriage or to claim that the certificate was not signed by him or by Alice Paulson. The relevance of the certificate was to show the date of defendant's purported marriage to Alice Paulson. Since this date is acknowledged, the admission of the marriage certificate could not be prejudicial. However, the very document received was furnished to Immigration authorities by defendant himself and was selected by the trial court (who heard the case without a jury) from the

official Immigration file, which file was properly identified by its custodian, Immigration Officer Peter Szambelino (Tr. pp. 3, 7).

Government Exhibit 2(a) consists of the defendant's application for immigrant visa and supporting papers which were also selected by the trial court from the Immigration file relating to defendant (Tr. p. 46). It was objected to by defendant's trial counsel on the grounds that it was "irrelevant" and was "not the best evidence" (Tr. p. 46). No claim was made that it was not in fact defendant's application. It is relevant to show that defendant's false statements to the Immigration authorities were made with fraudulent intent inasmuch as the denial of his Greek marriage and the denial of the existence of his Greek child were repeated in this visa application. The visa application is also relevant to the issue of the materiality of defendant's representation that he was not married in Greece. It in fact evidences his official request for special status based upon his alleged marriage to Alice Paulson, which application was granted.

CONCLUSION

It is clear from the record that defendant was successful in obtaining residence in the United States as the purported husband of an American citizen, Alice Paulson, through a series of brazen claims both to Immigration authorities and to the unfortunate Alice Paulson herself that he had never been married in Greece. He was in fact married to a Greek wife and had a Greek daughter at the very time he purported to marry Alice Paulson on February 7, 1964. His Greek divorce was not obtained until after he returned to Greece on voluntary departure--a return

Journey paid for by Alice Paulson--to apply for nonquies residence in the United States.


The judgment of conviction entered by the trial court should be affirmed.

Respectfully submitted,


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District of Oregon

RICHARD C. HELGESON
Assistant United States Attorney
Of Attorneys for Appellee

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


RICHARD C. HELGESON
Assistant United States Attorney
Of Attorneys for Appellee

I HEREBY CERTIFY that I have made service of the foregoing Respondent's Brief on the appellant herein by depositing in the United States Post Office at Portland, Oregon, on July 17, 1968, one certified and two uncertified copies thereof, enclosed in an envelope with postage thereon prepaid, addressed to James P. Leahy, Esq., ^{CLATSOP}~~Clackamas~~ County Courthouse, Astoria, Oregon, attorney of record for appellant.


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Assistant United States Attorney
Of Attorneys for Appellee

NO. 22799

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSCOE LEWIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

OCT 21 1964

WM. B. LUCK

APPELLEE'S BRIEF

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THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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TOPICAL INDEX

	<u>Page</u>
Table of Authorities	ii
I STATEMENT OF THE CASE	1
ARGUMENT	5
I SECTION 4705(a) IS AN INTEGRAL PART OF A STATUTORY SCHEME BASED ON A VALID CONGRESSIONAL EXERCISE OF THE TAXING POWER.	6
II SECTION 4705(a), AS APPLIED TO LEWIS, DOES NOT VIOLATE HIS PRIVILEGE AGAINST SELF-INCRIMINATION.	7
1. Lewis, as Buyer, Was Not Himself Compelled To Acquire An Order Form Nor To Divulge Any Incriminatory Information.	10
2. Applying The Constitutional Guidelines Of Recent Supreme Court Decisions, Section 4705(a) Does Not Evidence a Statutory Scheme Creating Substantial Risk of Self-Incrimination.	12
III NON-ISSUANCE OF ORDER FORMS FOR ILLEGAL SALES OF HEROIN DOES NOT PRECLUDE PROSECUTION OF LEWIS PURSUANT TO SECTION 4705(a).	18
1. It Is Essential To Government Regu- lation Of Narcotics That Heroin Not Be Excepted From Such Regulation.	18
2. Due Process Is Not Offended By Apply- ing Section 4705(a) To Heroin Transfers, Since That Section Operates Essentially The Same As All Licensing Statutes.	19
CONCLUSION	21

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
Albertson v. S. A. C. B. , 382 U. S. 70 (1965)	8, 10
Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936)	12
Browning v. United States, 366 F. 2d 420 (9th Cir. 1966)	16, 20
Grosso v. United States, 390 U. S. 62 (1968)	7-9, 11, 15-17
Haynes v. United States, 390 U. S. 85 (1968)	8-9, 11-12, 15-16
Leary v. United States, 392 F. 2d 220 (5th Cir. 1968), cert. granted 392 U. S. 903 (1968)	16-17
Marchetti v. United States, 390 U. S. 39 (1968)	7-8, 11, 15-17
Nigro v. United States, 276 U. S. 332 (1928)	6, 14
Rogers v. United States, 340 U. S. 367 (1951)	9-10
Ruiz v. United States, 328 F. 2d 56 (9th Cir. 1964)	16
Rule v. United States, 362 F. 2d 215 (5th Cir. 1966), cert. denied 385 U. S. 1018 (1967)	16
United States v. Doremus, 249 U. S. 86 (1918)	6
United States v. McGee, 282 F. Supp. 550 (N. D. Tenn. 1968)	17
United States v. Minor, (2d Cir.) No. 31953, July 3, 1968, at 2954-55	11, 14, 16

United States v. Reyes, 280 F.Supp. 267 (S. D. N. Y. 1968)	17
United States v. Vial, 282 F.Supp. 472 (D. Mass. 1968)	17
Webb v. United States, 249 U. S. 96 (1919)	19-20

Constitution

United States Constitution:

Fifth Amendment	8-11, 14, 16-17
-----------------	-----------------

Statutes

21 United States Code

§174	2
------	---

26 United States Code

§4701(a)	6
§4705(a)	2, 4, 5-7, 10-14, 16-20
§4731	6, 18
§4742(a)	16
§7852(a)	12

Regulations

21 C. F. R. , parts 302-307	13
-----------------------------	----

Miscellaneous

Harrison Narcotic Drug Act of 1914	5
Report on the Traffic in Opium and Other Dangerous Drugs, United States Treasury Dept. , Bureau of Narcotics, p. 43 (1966)	6-7, 13, 14

IN THE UNITED STATES COURT OF APPEALS
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ROSCOE LEWIS,

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UNITED STATES OF AMERICA,

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APPELLEE'S BRIEF

I

STATEMENT OF THE CASE

On September 27, 1967, a ten-count indictment was returned by the Federal Grand Jury naming Appellant Roscoe Lewis (hereinafter referred to as Lewis or defendant), Curtis Thelma Stephens and Anthony Dio Bowser as defendants for their participation in three sales of heroin to Federal Bureau of Narcotics Agent Charles Henry. Lewis was named in Counts One through Six. Stephens and Bowser are not involved in this appeal, since the record shows that Stephens plead guilty to Counts One and Four and Bowser was a fugitive (R. T. 38, 52-58).^{1/}

^{1/} "R. T." refers to Reporter's Transcript.

On November 29 and November 30, 1967, a court trial was held before the Honorable A. Andrew Hauk, United States District Judge. Defendant was found guilty on Count Six of the Indictment which charged a violation of Title 26, United States Code, Section 4705(a) (R. T. 247). He was acquitted on Counts One through Five; Counts One, Two, Four and Five charged violations of Title 21, United States Code, Section 174. Count Three charged a violation of Title 26, United States Code, Section 4705(a).

On December 21, 1967, defendant was sentenced to a term of seven years and a notice of appeal in forma pauperis was filed (R. T. 329).

On this appeal, Lewis does not dispute the sufficiency of the evidence to convict him of a violation of Title 26, United States Code, Section 4705(a). Instead he challenges the constitutionality of the statute.

The evidence showed that Lewis, Stephens and Bowser were present during a conversation at Stephens' home concerning the purchase of heroin by Agent Henry on September 5, 1967 (R. T. 99, 100). Later that day, Agent Henry called Stephens and they agreed to meet at a bowling alley. Mr. Lewis came into the bowling alley and brought Agent Henry to a pickup truck where Stephens was waiting. Agent Henry entered the truck and sat between Lewis and Stephens. Stephens handed a package containing heroin to Agent Henry in exchange for \$150.00 in the presence of Lewis. Stephens and Lewis agreed to make a future

sale to Agent Henry "in a couple of days." (R. T. 101-102).

On September 7, 1967, Agent Henry called the defendants to discuss another purchase of heroin. The telephone was answered by Lewis who brought Stephens to the phone. Later that day, Agent Henry again called the same number and spoke to Lewis. Agent Henry testified:

"I asked Mr. Lewis would it be possible for me to meet him at the bowling alley again, and he said yes. I told him that I would be there at approximately 3:25 or 3:30 that day. He said, 'We will be there.' " (R. T. 104-106).

After some delays, defendant Lewis arrived at the bowling alley in the same pickup truck as was used on September 5, 1967. Lewis told Agent Henry that Stephens was waiting at a nearby taco stand. During the ride to that location, Lewis and Agent Henry had a conversation concerning a future purchase of cocaine. Defendant was agreeable but indicated that he did not have a "good connection" at that time (R. T. 107-108).

Stephens entered the pickup truck and handed a bag of heroin to Agent Henry in exchange for government money. The three men then discussed future purchases for large amounts of heroin and cocaine (R. T. 109-110).

The evidence also showed that neither defendant requested a written order form for the purchase of heroin from Agent Henry at the time of the two transactions and no order form was

ever exchanged (R. T. 142-143).

The Government introduced as Exhibit 3 a copy of the standard order form issued by the Secretary of the Treasury for legal transactions under Title 26, United States Code, Section 4705(a). Agent Frank Sojat of the Federal Bureau of Narcotics testified that this is the only type of order form for 4705(a) transfers (R. T. 180). He also testified that this form could be used for heroin and that it is the form for the transfer of opium derivatives. Heroin is an opium derivative (R. T. 195-198).

The trial court granted a motion for a judgment of acquittal on Counts One, Two and Three (R. T. 210-211). A motion for judgment of acquittal on Counts Four, Five and Six was denied after extensive argument (R. T. 211-221).

Defendant called Stephens as a witness who testified that defendant had never personally handled the heroin on September 7, 1967, the date of the transaction, alleged in Counts Four, Five and Six (R. T. 230-231).

The Court found the defendant not guilty on Counts Four and Five, apparently because the evidence did not show that defendant handled the heroin (R. T. 237-243). Defendant was found guilty on Count Six (R. T. 243-247).

ARGUMENT

Defendant's entire brief is an attack on the constitutionality of Title 26, United States Code, Section 4705(a). This statute requires a seller of narcotic drugs to obtain from the buyer an order on a form issued by the Secretary of the Treasury prior to any sale. It is analagous to the every-day requirement that a customer or patient (buyer) present a prescription (order form) from a doctor (Secretary of the Treasury) before a pharmacist (seller or defendant in this case) sells narcotic drugs.

The statute has been in effect in substantially its present form since the Harrison Narcotic Drug Act of 1914, and thousands of prosecutions have occurred under it. No court has ever held it unconstitutional.

Defendant challenges the statute on the following grounds:

1. That it is an unconstitutional exercise of the taxing power,
2. That it violates his privilege against self-incrimination, and
3. That it requires the performance of an impossible act.

These challenges are inter-related but will be separated for discussion.

SECTION 4705(a) IS AN INTEGRAL PART OF
A STATUTORY SCHEME BASED ON A VALID
CONGRESSIONAL EXERCISE OF THE TAXING
POWER

Defendant's initial challenge is his claim that the statute is not a valid exercise of the taxing power. Any discussion of this point must begin with a recognition of the fact that the Supreme Court upheld the statute on this very ground in United States v. Doremus, 249 U.S. 86 (1918). See Nigro v. United States, 276 U.S. 332 (1928). Defendant has cited no case and the Government has found none which overrules Doremus.

Defendant's contention on this point actually overlaps his contention that the statute violates his privilege against compulsory self-incrimination, since there can be no question that Congress may tax virtually any activity. The question is whether Congress has exercised its taxing power in a way which forces an individual to incriminate himself.

Defendant states that there is no tax on heroin. However, heroin is a derivative of opium and all opium derivatives are taxed at the rate of \$.01 per ounce or fraction of an ounce. See 26 United States Code, Section 4701(a) and 26 United States Code, Section 4731.

A Government report shows that 170,000 kilograms of opium were legally imported during the year 1966. Traffic in Opium and Other Dangerous Drugs, United States Treasury

Department, Bureau of Narcotics, page 43 (1966). The same report shows that over \$1,365,000 in taxes, fines and other revenue were collected on narcotic drugs and marihuana during that year. Id. at 45.

In any event, defendant is not being prosecuted for his failure to pay any taxes. He is charged with the specific failure to obtain from a purchaser an order form for the sale of narcotics. His argument on this question is really a claim that the statute is an unconstitutional exercise of the taxing power because compliance results in compulsory self-incrimination.

II

SECTION 4705(a), AS APPLIED TO LEWIS, DOES NOT VIOLATE HIS PRIVILEGE AGAINST SELF - INCRIMINATION

Lewis' primary contention is that his conviction for sale of narcotics without obtaining the requisite order form from the buyer violated his privilege against self-incrimination. The relevant statute, Section 4705(a) of Title 26, United States Code, prohibits any sale of narcotic drugs unless the buyer furnishes "a written order . . . on a form . . . issued in blank for that purpose by the Secretary or his delegate." In support of his contention that compliance with this statutory requirement would have incriminated him thus rendering this Section unconstitutional, Lewis cites three recent United States Supreme Court cases, Marchetti v. United States, 390 U.S. 39 (1968); Grosso v. United

States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968).

Marchetti, Grosso and Haynes expressly derived their basic rationale from Albertson v. S.A.C.B., 382 U.S. 70 (1965). In Albertson, the statutory requirement that Communist party members complete and file a registration form was held violative of the Fifth Amendment's prohibition of compulsory self-incrimination. The focal point of the Albertson decision was the finding that Communist registration statutes, rather than being "neutral on their face and directed at the public at large", were "directed at a highly selective group inherently suspect of criminal activities." Albertson thus enunciated the standard that the Court was to follow in subsequent cases. Albertson v. S.A.C.B., 382 U.S. 70, 79 (1965); See, Marchetti, supra, at 47; Grosso, supra, at 64; Haynes, supra, at 96.

Adhering to Albertson, the Court in Marchetti and Grosso, found that registration and tax requirements imposed on gamblers violated the Fifth Amendment. The fact that gambling was illegal in forty-nine states meant that registration requirements aimed at this selective group amounted to little more than a purposeful plan to gather evidence from citizens in order to aid in securing their convictions.

"Whatever else Congress may have meant to achieve, an obvious purpose of this statutory system clearly was to coerce evidence from persons engaged in illegal activities for use

in their prosecution. "

390 U.S. at 74 (Justice Brennan concurring)

Similarly, in Haynes, compulsory registration of only those types of firearms (sawed-off weapons, machine guns, silencers) commonly used in illegal pursuits by a "selective group inherently suspect of criminal activities" was found violative of the Fifth Amendment.

"These limitations [length of weapon, silencers, etc] . . . were apparently intended to guarantee that only weapons used principally by persons engaged in unlawful activities would be subjected to taxation It is pertinent to note that the Committee on Ways and Means of the House of Representatives, while reporting in 1959 on certain proposed amendments to the Act, stated that the 'primary purpose of [the Firearms Act] was to make it more difficult for the gangster element to obtain certain types of weapons. The type of weapon with which these provisions are concerned are the types it was thought would be used primarily by the ganster-type element.' "

390 U.S. at 87-88, N. 4

In striking down these regulatory provisions, the Court applied the general Fifth Amendment standard that to be invalid there must be a "real and appreciable" hazard of self-incrimination in the registration scheme. Grosso, supra, at 67; Rogers v.

United States, 340 U.S. 367, 374 (1951). The Court made clear that such danger was found because, as in Albertson, rather than registration provisions aimed at effecting regulation of non-criminal as well as criminal activity ("neutral on their face and directed at the public at large") these regulations were designed to ferret out and coerce information from one selective group - those engaged in illegal activities.

Lewis' reliance on these cases is misplaced unless somehow he can show that within their prohibitory ambit is included the acquisition of a form by a person other than the seller-defendant, namely the buyer. And, as will be seen, infra, even if the Fifth Amendment privilege were thus held "negotiable" no real and appreciable hazard of incrimination exists nor is Section 4705(a) "directed at a highly selective group inherently suspect of criminal activities".

1. Lewis, As Buyer, Was Not Himself Compelled To Acquire An Order Form Nor To Divulge Any Incriminatory Information.
-

The order form provision under which Lewis was convicted is designed to effectuate the congressional purpose that sales of narcotics be made only to authorized purchasers. The purchaser, never the seller, is under an obligation to apply for and obtain the order form and submit the required information. The only requirement imposed by Section 4705(a) upon the seller is that he not sell until the buyer provides a written order form obtained from the Government. Unlike the situations in Albertson,

Marchetti, Grosso and Haynes, the seller is not required to pay any tax, submit any information to the Government, or file any registration application. Thus, Section 4705(a) compelled nothing of Lewis; accordingly, the privilege against compulsory self-incrimination could not have been violated. Support for this conclusion is found in the leading post-Marchetti case, deciding that Section 4705(a) does not violate the Fifth Amendment.

"The statutory language makes manifest . . . that the purchaser of narcotics and not the seller is under compulsion to apply for and obtain the requisite order form. Even if we were to assume arguendo that the . . . purchaser's Fifth Amendment rights [are infringed] . . . it hardly follows that a seller . . . is immune from prosecution for selling to a person who failed to provide the form. We need cite no authority for the principle that the privilege afforded by the Fifth Amendment is personal and that under the circumstances present here a seller cannot benefit from the privilege allegedly available to the buyer [I]t is clear that standing under the Fifth Amendment is not freely negotiable nor transferable."

United States v. Minor, (2d Cir.) No. 31953.

July 3, 1968, at 2954-55.

Insofar as Lewis intimates that the privilege would be

violated by the administrative regulation requiring the seller to file and keep the buyer's order form in his possession, it should be a sufficient answer that Lewis was not charged with violation of this regulation. Even if this were not so and if other provisions were to be found constitutionally suspect, Section 4705(a) can be effectively enforced apart from these other provisions, thus freeing it from constitutional impediment. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348 (1936), (concurring opinion of Justice Brandeis), cited in Haynes, supra, at 92. It should also be noted that 26 U.S.C. §7852(a) provides:

"If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application to other persons or circumstances, shall not be affected thereby. "

2. Applying The Constitutional Guidelines Of Recent Supreme Court Decisions, Section 4705(a) Does Not Evidence A Statutory Scheme Creating Substantial Risk of Self-Incrimination.
-

Even viewing Section 4705(a) in the light of Lewis' fictitious vicarious shifting of the possibility of incrimination from buyer to seller, that Section's validity is not affected by the recent Supreme Court decisions discussed above. Those cases were cases where defendants were compelled to give incriminating information demanded by statutory schemes aimed only at

select groups known for their criminal activity. In effect, the statutes struck down by the Court were primarily concerned with "asking all thieves in the room to stand up. " In sharp contrast, Section 4705(a) is aimed primarily at the regulation of the legitimate market in narcotics:

"Controls on domestic trade in narcotic drugs directly apply to people who handle, sell, or dispense narcotics for lawful medical purposes; such as physicians, hospitals, pharmacists, retailers, and others."

Report on the Traffic in Opium and Other

Dangerous Drugs, 1966, Bureau of Narcotics, (hereinafter cited as "Annual Report")

The multi-million dollar narcotics business is, to a large extent, legal. This vast legal industry is actively regulated by the Federal Bureau of Narcotics during all stages of legitimate distribution, pursuant to comprehensive and interrelated statutes and regulations. See, e. g., 21 C.F.R., Parts 302-307. Through the order form and registration provisions of the narcotics laws, the Bureau closely regulates the domestic distribution among importers, manufacturers, wholesalers, retailers, medical practitioners, hospitals and researchers. That these provisions are designed to regulate legitimate transactions in narcotic drugs is borne out by the fact that, as of December 1966, there were

394,193 registrants under the narcotics laws who were authorized to obtain written order forms from the Government and engage in legitimate transactions in narcotic drugs. See 1966 Annual Report, supra, at 44. Rather than a group "inherently suspect" of criminal activities, this group of nearly 400,000 registrants, contained only one person who was charged with a federal narcotics violation in 1966. See 1966 Annual Report, supra, at 10. Thus, these order forms and other related provisions are regulatory in nature, providing legal methods and procedures for carrying on the legal business of sale and distribution of narcotic drugs.

That the order form provisions of the federal narcotic laws are designed to legitimize, not to incriminate, is substantiated by the case law in this area. The United States Supreme Court has found that:

"These order form provisions constitute a needed check on illegal sales, and they are distinctly helpful in the detection of any attempted dealing in, or selling of, the drug free from the tax . . . to punish him for this misuse of the order form is not to punish him for not recording his own crime."

Nigro v. United States, 276 U.S. 332, 346-51 (1928).

In the recent Second Circuit case of United States v. Minor, supra, Section 4705(a) was held not to violate a heroin seller's Fifth Amendment privilege, because only the buyer was required

to apply for a form. The Court went on to uphold the statute as applied to a heroin seller, distinguishing it from the statutes in Marchetti, Grosso and Haynes:

"And, we believe that §4705(a) serves an important function within the statutory scheme . . . requiring that sales be made only to persons who have acquired and are able to produce Treasury forms ensures that narcotic drugs will not be transferred to unauthorized purchasers or to those who are likely to evade the payment of taxes Section 4705(a) ensures that narcotics do not fall into the hands of those who, for one reason or another, cannot satisfy the registration requirements of Section 4722. And, a seller's failure to fill out or retain the order form in no way affects the statutory purpose of limiting sales to purchasers who are duly authorized to deal in narcotic drugs

"In Marchetti and Grosso the Court placed great emphasis on the wide prohibition against gambling under both federal and state law . . . and stressed that the gambling statutes were directed at a 'selective group inherently suspect of criminal activities' . . . the firearm registration statutes before the Court in Haynes had the even more apparent purpose of gathering information from possible criminals in order to secure their conviction of various crimes

"Section 4705(a), on the other hand, cannot be said to be directed primarily at those 'inherently suspect of criminal activities' [I]t was one section of an important and significant statutory scheme regulating the conduct of a lawful business. "

United States v. Minor, (2d Cir.) No. 31953,
July 3, 1968, at 2957-60.

Prior to Marchetti, Grosso and Haynes, this Court upheld the statutory order form requirements relating to the sale of marihuana, 26 U.S.C. §4742(a); Browning v. United States, 366 F.2d 420, (9th Cir. 1966). See also Riuz v. United States, 328 F.2d 56 (9th Cir. 1964). It should be noted that in these cases, this Court was faced with similar self-incrimination contentions as proposed here by Lewis and that the order form provision for marihuana is essentially the same as Section 4705(a).

On the same day that certiorari was granted in Marchetti, certiorari was denied for a marihuana case in which similar Fifth Amendment issues were decided adversely to the defendant. Rule v. United States, 362 F.2d 215 (5th Cir. 1966), cert. denied 385 U.S. 1018 (1967).

After the Marchetti, Grosso and Haynes decisions, Section 4705(a) was found constitutional in the Second Circuit Minor case, supra. The Fifth Circuit upheld the constitutionality, on the same grounds as Minor, of the order form requirement for marihuana sales, even though there the buyer was the defendant. Leary v.

United States, 392 F.2d 220 (5th Cir. 1968), cert. granted 392 U.S. 903 (1968). Similarly, Judge Wyzanski has recently upheld the marihuana order form's constitutionality under the Fifth Amendment. United States v. Vial, 282 F.Supp. 472 (D. Mass. 1968). See also United States v. Reyes, 280 F.Supp. 267 (S.D. N. Y. 1968); c.f. United States v. McGee, 282 F.Supp. 550 (N.D. Tenn. 1968).

Lewis, in essence, fictitiously poses a statute which requires a seller to submit incriminating evidence, such requirement having as its target the illegal sale of narcotics by the select group of those involved in such criminal activity. No such statute is at issue. In fact, there can be no case of registration of any illegal narcotics sale, simply because any request for an order form would be denied. Illegality thus precludes registration. This contrasts sharply with the Marchetti-Grosso situation where gamblers engaged in illegal activity were compelled to register and thereby incriminate themselves. There, illegality was in effect the factor prompting the registration requirement. Under Section 4705(a), incrimination, far from being "a real and appreciable hazard" is quite impossible -- i. e. , since order forms are reserved for legal sales of narcotics, they will necessarily be absent in illegal sales; they cannot incriminate in such sales. This follows from the fact that Section 4705(a) is designed to legitimize sales rather than record illegal sales.

III

NON-ISSUANCE OF ORDER FORMS FOR ILLEGAL SALES OF HEROIN DOES NOT PRECLUDE PROSE- CUTION OF LEWIS PURSUANT TO SECTION 4705(a)

1. It Is Essential To Governmental Regulation
Of Narcotics That Heroin Not Be Excepted
From Such Regulation.
-

Lewis too easily comes to the conclusion that heroin is entirely distinct from other narcotic drugs and thus its regulation cannot be viewed the same as the regulation of other narcotics. Heroin (diacetyl morphine) is an opium derivative which is created from morphine. When left standing for long periods, heroin hydrolyzes and breaks down into morphine (and two acidic acid radicals) again. [See R. T. at 204] Thus, it belies the facts to intimate that regulation of the vast, often lawful, narcotics trade is distinct from regulation of the trade in heroin, indisputably a narcotic drug (See 26 U. S. C. §4731) derived from morphine. There is only one order form for the transfer of narcotic drugs; that there has been no known recent, lawful trade in the one form of opium derivative which Lewis illegally sold should not provide justification for treating the order form provision differently in relation to one opium derivative than to another.

2. Due Process Is Not Offended By Applying Section 4705(a) To Heroin Transfers, Since That Section Operates Essentially The Same As All Licensing Statutes.

Lewis contends that since order forms are not known to have been recently issued to validate heroin sales, conviction for the sale of heroin without the form requires the performance of an impossible act. This contention is an obfuscation of the basic mechanics of criminal statutes. Lewis' severance of a heroin sale situation from other narcotics sales situations has no logical basis. If a licensed dealer in, e. g., morphine, were to sell to an illegal narcotics peddler and was then convicted of sale not pursuant to a Section 4705(a) order form, under Lewis' rationale, he could successfully claim that, since order forms are never issued to illegal peddlers, the morphine seller was convicted for failure to perform an impossible act.

All states require drivers of motor vehicles to first acquire a license from the state. Blind persons can never receive such licenses. Under Lewis' rationale, a blind man convicted of driving without a license could successfully contend that his conviction was based on his non-performance of an impossible act.

Lewis' contention is contrary to decisions of the United States Supreme Court and of this Court. The Supreme Court has held that sale to a buyer who "cannot obtain an order blank because not of the class to which such blanks are allowed to be issued" does not make the prohibition of such sale unconstitutional. Webb v.

United States, 249 U.S. 96, 99 (1919). This Court has rejected the similar argument that because it was impossible to pay the tax on marihuana in his illegal situation, defendant could not be convicted for not acquiring the order form. Browning v. United States, supra, at 422.

As enacted and applied, Section 4705(a) forbids transactions that are not authorized by compliance with federal prerequisites. Lewis engaged in a course of conduct for which he had no authority, and in this was exposed himself to criminal sanction. It is irrelevant whether his buyer could not have obtained the authority which would have legitimized these dealings, for Congress has chosen to outlaw the black market in narcotics conducted by persons who are not within any of the classes specified for lawful trade in narcotics. The Government regards this case as essentially indistinguishable from prosecution of a person who practices law or medicine without a license. It would certainly be no defense to such a prosecution that the individual did not and could not meet the standards and prerequisites for permission to engage in such callings lawfully. Lewis' conviction is based on the forbidden act of transferring narcotics without falling in to the class of persons that the Government permits to transfer narcotics. His ineligibility to be included in this class and his consequent ineligibility to obtain the form from the buyer does not provide him with justification for engaging in the conduct prohibited by Section 4705(a). The fact of his ineligibility to sell heroin, rather than constituting an

impossible dilemma, left Lewis with the choice of refraining from such sale and thereby avoiding prosecution.

CONCLUSION

For the above stated reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 22,801

IN THE

**United States Court of Appeals
For the Ninth Circuit**

NEILA A. AUTENRIETH, et al.,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

**Appeal from the United States District Court
for the Northern District of California**

BRIEF FOR APPELLANTS

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Subject Index

	Page
Jurisdiction	1
Statement of the Case	2
Questions Involved	10
Specification of Errors	12
Argument	13
Preliminary Remarks	13
Summary of Argument	14
(1) The District Court erred in entering the Order, dismissing the Complaint dated January 22, 1968, on the ground that the Complaint failed to state a claim upon which relief can be granted	17
(2) The District Court erred when it dismissed the Complaint since it failed to distinguish between those citizens of the United States who can in good conscience contribute to the war effort and those such as Plaintiffs who cannot in good conscience participate in war even to the extent of their tax contribution	26
(3) The District Court erred in dismissing the Complaint and holding, in effect, that the recognition of Plaintiffs' civil rights to the extent of exempting them from their tax contribution to the war effort would make their belief superior to the law of the land	28
(4) The District Court erred in entering an Order dismissing the Complaint and holding that the recognition of Plaintiffs' rights to conscientiously refuse to contribute to the war effort by paying taxes would be tantamount to cause the destruction of the Republic and not holding to the contrary, that such recognition could preeminently bring about the preservation of the Republic	31

	Page
(5) The District Court erred in not holding that the Plaintiffs established <i>prima facie</i> that they believe that their contribution to the war effort to the extent of their tax payment may make them responsible under the London Treaty and the Judgment of Nuremberg	35
(6) The District Court erred in not holding that the Plaintiffs were entitled, because of their sincere beliefs, to be exempted from contributing to the war effort by paying taxes in support thereof pursuant to the various international treaties and commitments cited in the Complaint	38
Conclusion	40

Table of Authorities Cited

Cases	Pages
Application of Yamashita, 327 U.S. 1, 66 S.Ct. 340	39
Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476 (1965)	34
Dennis v. United States, 341 U.S. 494, 580, 71 S.Ct. 857 (1951)	34
Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877 ..	
.....	18, 20, 21
Ex parte Quirin, 317 U.S. 1, 63 S.Ct. 2	38, 39
Girouard v. The United States of America, 318 U.S. 61, 66 S.Ct. 816	29
Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 426, 54 S.Ct. 231	22
Jones v. City of Opelika, 316 U.S. 597, 62 S.Ct. 1289	18
Jones v. City of Opelika, 319 U.S. 105, 63 S.Ct. 891	18, 28

TABLE OF AUTHORITIES CITED

iii

	Pages
Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862 ...	18
Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870	14, 15, 17, 18, 19, 20, 26
Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149 (1937)....	33
Reynolds v. United States, 98 U.S. 145, S.Ct.	15, 21
United States v. Robel, U.S., 88 S.Ct. 419	21, 22, 23, 25, 38
United States v. Seeger, 380 U.S. 163, 85 S.Ct. 850 (1965)	35
West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178	30, 34

Constitutions

United States Constitution:	
Bill of Rights	26, 31
First Amendment	passim

Rules

Federal Rules of Civil Procedure:	
Rule 23	2
United States Court of Appeals Rules:	
Rule 18	40
Rule 19	40
Rule 39	40

Statutes

59 Stat. 1055	2
59 Stat. 1544	2, 6
61 Stat. 1218	2
Title 50 App USCA § 45, et seq.	16
Title 50 App USCA § 451	36, 37
28 USC 1291	2
28 USC 1294	2
28 USC 1331(a)	2

	Pages
28 USC 1333(1)	2
28 USC 1340	2
28 USC 1343	2, 9
28 USC 1343(3)	2
28 USC 1343(4)	2
28 USC 1651(a)	2
28 USC 1651(b)	2

Texts

Black, <i>The Great Rights</i> , p. 54 (Cahn, ed., 1963)	33
Douglas, <i>We the Judges</i> , p. 307 (1956)	33

Other Authorities

Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field and at Sea (6 UST 3114 TIAS 3363 75 UNTS 31)	4
Convention for Pacific Settlement of International Disputes (32 Stat. 1779, TS 392)	2, 5
Geneva Convention Relative to the Treatment of Prisoners of War	4, 6
Geneva Declaration (July 21, 1954)	3, 4, 5
Hague Convention of 1899, Article 22	6
Kellogg Briand Pact (46 Stat. 2343; TS 796; IV Trenwith 5130; 94 LNTS 57)	2, 6
United Nations Charter (59 Stat. 1031; TS 993)	2, 5
Article 1	6
Article 33	6
Universal Declaration of Human Rights (U.N. Document a/811 in force December 16, 1958)	2

No. 22,801

IN THE

**United States Court of Appeals
For the Ninth Circuit**

NEILA A. AUTENRIETH, et al.,	}
vs.	
UNITED STATES OF AMERICA,	
	<i>Appellants,</i>
	<i>Appellee.</i>

**Appeal from the United States District Court
for the Northern District of California**

BRIEF FOR APPELLANTS

I

JURISDICTION

This is an appeal from the Order of his Honor, Alfonso J. Zirpoli, United States District Judge for the Northern District of California, dismissing the Complaint (TR 59, 60) and entering a judgment of dismissal on February 29, 1968 (TR 61).

The United States District Court had jurisdiction of the issues raised by the

“Complaint for Declaration of Plaintiff’s Civil and Other Constitutional Rights and All Orders necessary to Enforce the Same” (TR 1-23)

under the Constitution and the laws of the United States and the treaties presently in force; under the Civil Rights Act, 28 USC Sec. 1343; 28 USC 1331 (a), 1333 (1), 1340, 1343 (3) (4) and 28 USC Sec. 1651 (a) and (b); Rule 23 of the Federal Rules of Civil Procedure. Jurisdiction is further claimed under various treaties such as 46 Stat. 2343, 32 Stat. 1779, 59 Stat. 1031, 59 Stat. 1055, 61 Stat. 1218, 59 Stat. 1544, and the Universal Declaration of Human Rights (U.N. Document a/811 in force December 16, 1958).

This Court has jurisdiction of this appeal under 28 USC 1291 and 1294.

II

STATEMENT OF THE CASE

The Complaint was filed on October 12, 1967, on behalf of 82 Plaintiffs (TR 1, 21, 22) and it was presented as a class suit on behalf of all other similarly situated Plaintiffs not named (TR 3, 4). Subsequently, an amendment to the Complaint was filed on January 16, 1968 (TR 55-58) in which 40 additional persons were joined as Plaintiffs (TR 56, 57).

The Complaint alleged that the Plaintiffs are natural persons who under the Constitution and the laws of the United States as well as under the treaties in force, are entitled to live their life, retain their liberty and pursue their happiness, and further are entitled to peaceful existence at home and abroad; that they comprise a class too numerous to bring

them all before the Court, and therefore, the issues are presented in the form of a class unit.

The Defendants named in the Complaint were Joseph M. Cullen, District Director of Internal Revenue Service, San Francisco, California, and Sheldon L. Cohen, Commissioner of Internal Revenue Service, Washington, D. C. (TR 4). However, the Order dismissing the Complaint treated it as one amended to name the United States of America as the proper party defendant (TR 59).

The Complaint cites pertinent provisions of the Geneva Declaration of the 21st day of July, 1954, the result of a conference during which the United States of America was present through its representative; that the United States did not join in the Declaration but set forth its position unilaterally stating among others that

“The Government of the United States being resolved to devote its efforts to the strengthening of peace in accordance with the principles and purposes of the United Nations takes note of the agreements concluded at Geneva on July 20 and 21, 1954 . . . and . . . declares with regard to the aforesaid agreements and paragraphs that (i) it will refrain from the threat or the use of force to disturb them, . . . and (ii) it would view any renewal of the aggression in violation of the aforesaid agreements with grave concern and as seriously threatening international peace and security.” (TR 6)

The final Declaration of Geneva provided, among others, that

“In order to ensure that sufficient progress in the restoration of peace has been made, and that all the necessary conditions obtain for free expression of the national will, general elections shall be held in July 1956 . . .”

in the territory known as Vietnam (TR 5). That the military juntas operating in the temporarily delineated part of Vietnam known as South Vietnam, supported by the government of the United States, refused to abide by the Geneva Declaration and refused to permit the holding of general elections; that the military juntas in control of the territory known as South Vietnam established a military dictatorship and subjugated its people in contravention to the Geneva Convention; of the laws of its own land and of the precepts of International Law (TR 7).

The Complaint also alleges that the juntas controlling the territory known as South Vietnam disregarded various international treaties to which Vietnam is a party, such as the Convention for the Amelioration of the Condition of Wounded and Sick in the Armed Forces in the Field and at Sea (6 UST 3114; TIAS 3363; 75 UNTS 31) and the Geneva Convention Relative to the Treatment of Prisoners of War (6 UST 3316; TIAS 3364; 75 UNTS 135). (TR 7).

The Complaint also alleges that when a large part of the peoples of South Vietnam rose against the military juntas and a civil war ensued, the United States intervened in violation of the Unilateral Decla-

ration of the United States delivered at the Geneva Convention on July 21, 1954; that such intervention was in violation of the Convention for Pacific Settlement of International Disputes (32 Stat. 1779; TS 392) and in further violation of the Charter of the United Nations (59 Stat. 1031; TS 993) and also in violation of the pertinent provisions of International Law (TR 7).

The Complaint alleged that representatives of those persons in the territory of South Vietnam who are part of the National Liberation Front charged that the Armed Forces of the United States in conjunction with the military forces of the military government controlling South Vietnam committed atrocities against civilians; destroyed civilian property by bombings and burning, and particularly that the Armed Forces of the United States bombed civilian territories contrary to the provision of treaties hereinabove mentioned and to which treaties United States is a party (TR 7, 8).

Allegations were also made that the above representatives charged that the Armed Forces of the United States did invade territory located north of the temporary demarkation line set forth in the Geneva Agreement of 1954, and that the Armed Forces of the United States repeatedly bombed the territory of North Vietnam; that the government of North Vietnam claims that under International Law and particularly under the treaties mentioned, the government of the United States is engaged in the perpetration of war crimes (TR 7-10).

The Complaint also alleges that the acts of the United States are in clear violation of the Geneva Convention of 1945 and further are in violation of Article 33 of the United Nations Charter pertaining to the Convention for Pacific Settlement of International Disputes, as they are in violation of Article 1 of the same charter; that the acts committed by the United States are in violation of the Hague Convention and of the Geneva Convention of 1907 and of the London Treaty of 1954 (59 Stat. 1544; EAS 472; 82 UNTS 279). Particular reference is made to Article 22 of the Hague Declaration of 1899 which provides aerial bombardment for the purpose of terrorizing the civilian population or destroying or damaging private property or injuring non-combatants, is prohibited (TR 14).

The Complaint alleges that the representatives of a National Liberation Force charge that the acts of the United States committed in the territory of Vietnam is in clear violation of the Kellogg Briand Pact (46 Stat. 2343; TS 796; IV Trenwith 5130; 94 LNTS 57).

That the United States became a party of this pact and the same was entered into force on July 24, 1929, and therefore, the United States is bound by the declaration that the parties to the pact

“condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations to one another.”

And that the United States also agreed pursuant to said pact that

“... the settlement or solution of all disputes or conflicts of whatever nature or whatever origin they may be, which may arise among them (the parties to the pact), shall never be sought except by pacific means.” (TR 15)

The Complaint also alleges that the London Treaty of 1945 to which the United States is a party, provided for the convening of the Nuremberg War Crime Trials and that the judgment brought in by the Tribunal there found individuals and institutions guilty of war crimes; that the judgment of Nuremberg while finding the General Staff and high command not guilty of war crimes, nevertheless, condemned the organizations because they

“... sat silent and acquiescent, witnessing the commission of crimes on a scale larger and more shocking than the world has ever had the misfortune to know. This must be said. Where the facts warrant it, these men should be brought to trial so that those among them who are guilty of these crimes should not escape punishment.” (TR 17)

The Plaintiffs alleged as their belief that the precedent above mentioned makes it mandatory in International Law for all persons not to sit silent, nor be acquiescent when witnessing the commission of acts in violation of International Law and existing treaties. They particularly believe that precedent was established against silence when it was adjudged in Nuremberg that

“... Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification.” (RT 18)

The Plaintiffs alleged that under the Constitution of the United States that as citizens they cannot be required to participate in war or in support of war contrary to their conscience; that if they conscientiously object to participation in war in any form they cannot be compelled to participate by contributing to the expenses of the war, and that, therefore, being taxed for war purposes is contrary to law and the Constitution. That they are conscientiously opposed to war in any form, and therefore, they may not be compelled to contribute to the cost of war in Vietnam, and therefore, the Defendant ought to be ordered to reimburse the Plaintiffs for such part of the taxes paid by them for the years 1965-1966 which represents a proportional contribution to the war effort objected to by the Plaintiffs (TR 18, 19).

The Complaint alleges that each of the Plaintiffs filed with the Director of Internal Revenue Service their respective tax return and paid their taxes in full, and that subsequently they filed their Form 843, that being a claim for refund of that part of the taxes which are used for support of the war (TR 20). That the Director of Internal Revenue Service rejected Plaintiffs' claim for refund, and in the Complaint the Plaintiffs listed the amount of their respective taxes for the years 1965 and 1966 and the

respective refund claimed by the Plaintiffs that they are entitled to (TR 21, 22).

The amended Complaint adds on behalf of six of the Plaintiffs the amount of tax paid for 1966 and the amount of refund claimed (TR 55). On behalf of additional Plaintiffs a table shows their respective taxes and their respective refund claim (TR 56, 57).

The prayer of the Complaint asks the United States District Court to enter an Order, declaring Plaintiffs' rights under the Civil Rights Act as well as under the pertinent provisions of the Constitution and the laws of the land, and further prayed for an Order declaring that they are entitled to the refund on such part of their respective taxes paid by them for the years 1965 and 1966 which are expended in support of the war effort in the amount set forth in the table included in the Complaint. They also ask that the Court enter such further Orders which are required in support of the declaration of the Plaintiffs' rights and that the Defendants be required to refund the Plaintiffs such part of the taxes which were described heretofore (TR 22, 23).

The Defendants moved to dismiss the Complaint on the ground that the Complaint failed to state a claim upon which relief can be granted (TR 26).

Pursuant to Notice of Hearing (TR 24) and Stipulation of the Parties (TR 35) and Order of the Court (TR 38) the Motion to Dismiss was heard on January 22, 1968 by the Honorable Alfonso J. Zirpoli, who after hearing argument by counsel, filed his

written Order, dismissing the Complaint and treating the Complaint as one for the refund of taxes only, and treating the parties plaintiff as having standing to sue, and assuming that the Plaintiffs' beliefs of non-payment of taxes for war purposes constitutes a sincere and religious tenet, dismissed the Complaint

“... for failure to state a claim upon which relief can be granted.” (TR 59, 60)

Judgment of dismissal was entered accordingly and the Complaint was dismissed with prejudice on January 22, 1968 (TR 61).

Plaintiffs filed their Notice of Appeal (TR 62, 63), Designation of Contents of Record on Appeal (TR 64, 65) and Costs on Appeal (TR 67), and their Statement of Points upon which Plaintiffs-Appellants Rely on Appeal.

III

QUESTIONS INVOLVED

(1) Is a person who is not of draft age but who conscientiously objects to war in any form entitled under the equal protection clause of the Constitution to the same consideration as a conscientious objector of draft age, and therefore, is he to be relieved as Plaintiffs here claim of the payment of that part of the income tax that is used for war and for preparation for war?

Therefore, as a matter of law, the Trial Court erred in dismissing the Complaint on the ground that

it failed to state a claim upon which relief can be granted.

(2) Since Congress saw fit to exempt from military service those of draft age who conscientiously object to participate in war in any form even though others of draft age who do not object are not exempted, would the refusal to exempt objectors beyond draft age from their participation in the war in the form of their tax contribution be such class legislation which is forbidden by the Constitution of the United States?

(3) Is the collection of those parts of the taxes which are used for war purposes from persons who conscientiously object to participation in war not contrary to the First Amendment to the Constitution of the United States in that it is a tax laid specifically on the exercise of those freedoms guaranteed by such Amendment to the Constitution?

(4) Irrespective of the rightness or wrongness of this country's war efforts in Vietnam, the Complaint clearly and without contradiction shows and the Order of the Trial Court so recognized that Plaintiffs sincerely believe that they cannot conscientiously contribute their money for support of that war, and therefore, they stated a cause of action, and the dismissal of the Complaint was an error.

(5) Ought persons such as Plaintiffs who sincerely believe that their tax contribution to the war effort would bring them into conflict with the Nuremberg Judgment and with various treaties to which the United States is a party and would make them a vio-

lator of many provisions of International Law, be given an opportunity to have their tax contribution used for constructive purposes as conscientious objectors of draft age are permitted to do alternate service in lieu of induction?

IV

SPECIFICATION OF ERRORS

(1) The District Court erred in entering the Order, dismissing the Complaint dated January 22, 1968, on the ground that the Complaint failed to state a claim upon which relief can be granted.

(2) The District Court erred when it dismissed the Complaint since it failed to distinguish between those citizens of the United States who can in good conscience contribute to the war effort and those such as Plaintiffs who cannot in good conscience participate in war even to the extent of their tax contribution.

(3) The District Court erred in dismissing the Complaint and holding, in effect, that the recognition of Plaintiffs' civil rights to the extent of exempting them from their tax contribution to the war effort would make their belief superior to the law of the land.

(4) The District Court erred in entering an Order dismissing the Complaint and holding that the recognition of Plaintiffs' rights to conscientiously refuse to contribute to the war effort by paying taxes would be tantamount to cause the destruction of the Repub-

lie and not holding to the contrary, that such recognition could preeminently bring about the preservation of the Republic.

(5) The District Court erred in not holding that the Plaintiffs established *prima facie* that they believe that their contribution to the war effort to the extent of their tax payment may make them responsible under the London Treaty and the Judgment of Nuremberg.

(6) The District Court erred in not holding that the Plaintiffs were entitled, because of their sincere beliefs, to be exempted from contributing to the war effort by paying taxes in support thereof pursuant to the various international treaties and commitments cited in the Complaint.

V

ARGUMENT

Preliminary Remarks

The Order dismissing the Complaint treats it

“... as one for a refund of taxes only. It will treat the parties plaintiff as having standing to sue. And for the purposes of this order the court will assume, without deciding, that the belief in non-payment of taxes for war purposes constitutes a sincere and religious tenet.”

After so holding, the Trial Court then ordered the Complaint to be dismissed

“... for failure to state a claim upon which relief can be granted.”

In doing so the Trial Court distinguished the case of *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870

“... in that the tax here involved is imposed on all citizens regardless of religious practices and affects the very life of the civil government under which we live.”

The thrust of the Trial Court's Order to Dismiss is expressed in this manner:

“To permit the avoidance of the payment of income taxes or a portion thereof, which in effect is what plaintiffs seek in this action of refund, would in the language of the Supreme Court in *Reynolds v. United States*, 95 U.S. 145, 167 (correct citation 98 U.S. 145) ‘make the professed (practices) of religious belief superior to the law of the land, and in effect permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.’”

The Trial Court in dismissing the Complaint, concluded that

“The Framers of the Constitution intended the provision of the First Amendment that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the exercise thereof’ to serve as a vehicle for the preservation of the Republic and not one for its destruction.”

Summary of Argument

The Order dismissing the Complaint and the Judgment of Dismissal with prejudice indicates that the Trial Court in holding that the Complaint failed to state a claim upon which relief can be granted, failed to consider the thrust of Plaintiffs' position for the

sole apparent reason that such a thrust represents a departure from the more classical interpretation of the First Amendment rights. That the Trial Court failed to understand or even recognize the claim of Plaintiffs is indicated by the Trial Court's dismissal of *Murdock v. Pennsylvania*, supra, and its attempt to juxtapose and show a basic contrary holding in *Reynolds v. United States*, 98 U.S. 145, S.Ct.

The Plaintiffs claim, without contradiction, that they are sincerely opposed to participate in war and in preparation thereof, and because of their objection, they are conscientiously unable to remain silent when part of their federal income tax is used for the preparation of war. The Plaintiffs believe that the First Amendment rights guaranteed to them permits them to refuse to participate in war or in preparation thereof by contributing their taxes therefor, and they further believe that the Court is obligated to extend to them its protection so that their First Amendment rights and the exercise thereof may be secured to them.

The Plaintiffs sincerely believe that their unobjected payment of the taxes would be tantamount to violating the provisions of a great many international treaties to which the United States is a party; that their silent support of a war which they consider immoral (irrespective the rightness or wrongness of their stance) would bring them in head-on conflict with the holding of the Nuremberg Tribunal and further make them violators of certain pertinent holdings of International Law. The Plaintiffs are not asking

that they be given a position where each of them becomes “. . . a law unto himself” but they are simply asking that the First Amendment to the Constitution be given a scope which they believe the Framers thereof intended.

Plaintiffs contend that one, as each of them is, who conscientiously objects to participation in war and in preparation therefor in any form, ought not, and under the Constitution and particularly under the First Amendment thereto cannot, be compelled to contribute to the war effort by forcing him or her to finance such efforts with tax contributions.

Plaintiffs also contend that by contributing their taxes or part of them for purposes of war would deprive them of their status as conscientious objectors to war since clearly such tax payment contributes significantly to the war effort, and in fact, makes such effort possible. Whether or not the recognition of conscientious objection to war is a constitutional right or solely a grant by Congress, the historical fact remains that conscientious objection to war is recognized by Congress (Title 50 App USCA § 45 et seq) and to deprive these Plaintiffs of their classification as conscientious objectors to war while granting such classification to others would present an unconstitutional class legislation.

Plaintiffs further contend that they do not ask that each of them be recognized “. . . a law unto himself.” but they are simply asking the Court to declare that as persons of draft age may be exempted from physical draft and in lieu thereof they may do work of

national importance, so should their taxes be set aside for constructive use instead of being used for war purposes.

(1) **THE DISTRICT COURT ERRED IN ENTERING THE ORDER DISMISSING THE COMPLAINT DATED JANUARY 22, 1968, ON THE GROUND THAT THE COMPLAINT FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.**

In dismissing the Complaint with prejudice, the Trial Court distinguished or rather considered inapplicable here the holding of *Murdock v. Pennsylvania*, *supra*,

“... in that the tax here involved is imposed on all citizens regardless of religious practices and affects the very life of the civil government under which we live.”

Plaintiffs believe that exactly because the tax here involved is imposed upon them disregarding their conscientious objection to war, and therefore, the holding of the Trial Court is fatally erroneous. Holding as the Trial Court does that a tax that is imposed upon all citizens “... regardless of religious practices . . .” is unexceptional and thus proper, runs contrary to all holdings involving the First Amendment to the Constitution. Justice Douglas, speaking for the Court in *Murdock v. Pennsylvania*, *supra*, said

“It could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional.”

Plaintiffs submit that compelling them to contribute part of their taxes to the war effort to which they

conscientiously object is tantamount to placing a tax "... specifically on the exercise of those freedoms..." which are granted to them by the First Amendment.

Murdock v. Pennsylvania, supra, is not the only case which so holds, but *Martin v. City of Struthers*, 319 U.S. 141, 63 S.Ct. 862, *Douglas v. City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877, and the second decision in *Jones v. City of Opelika*, 319 U.S. 105, 63 S.Ct. 891, all hold that

"... a tax laid specifically on the exercise of those (First Amendment) freedoms would be unconstitutional."

The *Murdock v. Pennsylvania*, supra, case, vacated the holding of *Jones v. City of Opelika*, 316 U.S. 597, 62 S.Ct. 1239, because in this first *Jones* case the Supreme Court held

"... when a religious sect used 'ordinary commercial methods of sales of articles to raise propaganda funds', it is proper for the state to charge 'reasonable fees for the privilege of canvassing'. Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital."

The above cases involve religious colporteurs who were convicted of violation of a city ordinance which prohibited the sale of any merchandise within the city limits without a license (*Douglas v. City of Jeannette*, supra, *Murdock v. Pennsylvania*, supra, and the others were Jehovah's Witnesses who went from door to door canvassing literature and soliciting people "to

purchase" certain religious books and pamphlets published by the Watch Tower Bible & Tract Society). All of them were found to be in violation of the ordinance which provided that

"... all persons canvassing for or soliciting within said Borough, orders for goods, paintings, pictures, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the Burgess a license to transact said business and shall pay to the Treasurer of said Borough therefore the following sums . . ."

As Justice Douglas said in the *Murdock* case

"The alleged justification for the exaction of this license tax is the fact that the religious literature is distributed with a solicitation of funds."

The Justice goes on to say that while

" 'The state can prohibit the use of the street for the distribution of purely commercial leaflets, . . . but . . . They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes.' "

As against the holding of the Trial Court that the Plaintiffs are obligated to pay the taxes here involved because the same

"... is imposed on all citizens regardless of religious practices and affects the very life of the civil government under which we live."

Justice Douglas in *Murdock* teaches that

“The fact that the ordinance is ‘nondiscriminatory’ is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.”

In line with the above, the Plaintiffs maintain that taxing them equally with those who can conscientiously contribute to the war effort is immaterial because the protection afforded by the First Amendment cannot so be restricted, and that by alleging conscientious objection to finance the war effort by their taxes made out a cause, and therefore, the dismissal of the Complaint with prejudice was in error.

In the case of *Douglas v. City of Jeannette*, supra, the Chief Justice speaking for the Court held that

“Allegations of facts sufficient to show deprivation of right of free speech under the First Amendment are sufficient to establish deprivation of a constitutional right guaranteed by the Fourteenth Amendment and to state a cause of action within jurisdiction of federal district court under the Civil Rights Act whenever it appears that the abridgment of the right is affected under color of a state statute or ordinance.”

The Complaint here did allege facts sufficient to show that the Plaintiffs were deprived of certain First

Amendment rights and thus the Complaint did state a cause of action as did the complaint in the *Douglas* case.

The Trial Court cited *Reynolds v. United States*, supra, to the effect that the Plaintiffs' conscientious belief cannot be held to be superior to the law of the land because doing so they, as every other citizen, would become a law unto himself. The Trial Court warns with *Reynolds*, supra, that

“Government could exist only in name under such circumstances.”

However, the Trial Court failed to consider the teachings of the Supreme Court of the United States in *United States v. Robel*, U.S., 88 S.Ct. 419 (decided on December 11, 1967). In that case, the Supreme Court held an act of Congress unconstitutional, which act made it unlawful for a member of a Communist-action organization to engage in any employment in any defense facility. The Supreme Court held that the act sought to bar employment both of an Association which may be proscribed and of an Association which may not be consistently proscribed with First Amendment rights. The Plaintiffs submit that while it may be true that the Internal Revenue Code may prevent one to obtain declaratory relief when such relief is directed solely toward the repayment of federal taxes, the Code may not bar the judiciary determination of rights claimed to be protected under the First Amendment of the Constitution even though the Trial Court here so held in reliance on the *Reynolds* case. However, in *Robel*

where the Government attempted to defend the statute that it was passed pursuant to Congress' war power and in support of such defense cited a number of Supreme Court decisions, the Supreme Court stated

“... the phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit.”

The Supreme Court in the *Robel* case cited its decision in *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 426, 54 S.Ct. 231, to the effect that

“Even the war power does not remove constitutional limitations safeguarding essential liberties.”

The Court went on to state that however much the concept of national defense is of importance

“Yet, this concept of ‘national defense’ cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term ‘national defense’ is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.”

The Trial Court in the case at bar correctly points out that the Framers of the Constitution intended the provision of the First Amendment to serve as a

“... vehicle for the preservation of the Republic and not one for its destruction.”

However, the Trial Court failed to ask what kind of Republic did the Framers intend to preserve. Did they intend to pour new wine in the old container and look forward to maintaining the Republic in name only while substituting for the democratic values the concept of totalitarianism? Surely they did not because well nigh for two centuries this country

“... has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment.”

Would it not be more than ironic—would it not be tragic to preserve the Republic in name only? We would surely do so, were we to deny the underlying principles on which this Republic was founded.

The Plaintiffs submit that depriving them of the right to conscientiously object and conscientiously refuse to finance a war which they cannot support in good conscience

“... would sanction the subversion . . .”

of one of the First Amendment liberties—one of those liberties

“... which makes the defense of the Nation worthwhile.”

The term of preservation of the Republic cannot be invoked as *Robel*, supra, teaches

“... as a talismanic incantation to support . . .”
the deprivation of Plaintiffs' First Amendment rights.

The issues presented by the Complaint ask nothing more than for the Court to determine the line between Government coercion and private freedom. The coercion is applied here vis-a-vis First Amendment rights.

The Courts are to accept this competence to make the determination because the Supreme Court said

“When Congress’ exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our ‘delicate and difficult task’ to determine whether the resulting restriction on freedom can be tolerated. See *Schneider v. State of New Jersey*, 308 U.S. 147, 161, 60 S.Ct. 146, 150, 84 L. Ed. 155.”

Surely the Complaint presented a justiciable controversy, and in fact, the Trial Court treated the Plaintiffs as having standing to sue. He also assumed though not deciding that

“... the belief in non-payment of taxes for war purposes constitutes a sincere and religious tenet.”

Since that is so, then it was for the Trial Court to assume jurisdiction and while recognizing the Government’s justifiable interest, but holding with *Robel*, supra, to the effect that such interest does not eliminate the need to determine whether

“... the means chosen to implement that governmental purpose in this instance cuts deeply into the right ...”

of the Plaintiffs to obtain judicial determination of their constitutional rights as protected by the First Amendment.

The Supreme Court in the *Robel* case teaches that Federal Courts ought to be concerned

“... with determining whether the statute before us has exceeded the bounds imposed by the Constitution when First Amendment rights are at stake.”

The Plaintiffs submit that the Trial Court erred when it failed, as it should have been concerned in accordance with *Robel*, to scrutinize

“... when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a ‘less drastic’ impact on the continued vitality of First Amendment freedoms. *Sheldon v. Tucker*, supra; cf. *United States v. Brown*, 381 U.S. 437, 461, 85 S. Ct. 1707, 1721, 14 L.Ed. 2d 484. The Constitution and the basic position of First Amendment rights in our democratic fabric demand nothing less.”

The Plaintiffs submit that because of their uncontradicted claim to the protection of First Amendment rights, Congress must use means which have less than drastic impact on the continued vitality of such freedoms. This is what the Constitution demands and it cannot be negated by relying on the concept of preserving the Republic without asking what that Republic stands for.

Plaintiffs submit that the Order of the Trial Court and the Judgment of Dismissal with prejudice were in error which requires reversal.

- (2) THE DISTRICT COURT ERRED WHEN IT DISMISSED THE COMPLAINT SINCE IT FAILED TO DISTINGUISH BETWEEN THOSE CITIZENS OF THE UNITED STATES WHO CAN IN GOOD CONSCIENCE CONTRIBUTE TO THE WAR EFFORT AND THOSE SUCH AS PLAINTIFFS WHO CANNOT IN GOOD CONSCIENCE PARTICIPATE IN WAR EVEN TO THE EXTENT OF THEIR TAX CONTRIBUTION.

One of the apparent reasons for the Trial Court's dismissal of the Complaint may be found expressed in the statement that

"... the tax here involved is imposed on all citizens regardless of religious practices . . ."

However, as Justice Douglas in *Murdock v. Pennsylvania*, supra, said

"The fact that the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted."

The Plaintiffs submit that the genius of the Constitution and the concern of the Bill of Rights and the First Amendment lies in the practice of discrimination and the ability to discriminate between individuals and issues. Again referring to *Murdock v. Pennsylvania*, supra, we point to

"Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital."

So it is vital here to make the distinction between those who can conscientiously participate in war and those such as the Plaintiffs who cannot do so. The Constitution does not brook an attitude which holds that just because some taxpayers support the war

effort by their payment, therefore, others may not claim constitutional privilege against such payment by saying that since the tax here involved is imposed on all citizens regardless of religious practices, and therefore, is wholly proper, takes all meaning away from the rights protected by the First Amendment.

The Plaintiffs submit that the argument so expressed by the Trial Court can be carried *ad absurdum* by saying that the constitutionally protected objection to the war comes into effect only when all citizens object without exception. This kind of nondiscriminatory interpretation of the First Amendment would surely affect

“... the very life of the civil government under which we live.”

Such kind of sterile interpretation of the Constitution would positively not serve as a

“... vehicle for the preservation of the Republic ...”

but to the contrary, would lead to its destruction.

The failure of the Trial Court to make the necessary distinction between those who are unable because of their conscience to finance the war effort and those who are of the contrary belief or who are willing to remain silent, was an error as was the dismissal of the Complaint which requires reversal by this Honorable Court.

(3) THE DISTRICT COURT ERRED IN DISMISSING THE COMPLAINT AND HOLDING, IN EFFECT, THAT THE RECOGNITION OF PLAINTIFFS' CIVIL RIGHTS TO THE EXTENT OF EXEMPTING THEM FROM THEIR TAX CONTRIBUTION TO THE WAR EFFORT WOULD MAKE THEIR BELIEF SUPERIOR TO THE LAW OF THE LAND.

It is hard, if not impossible, for the Plaintiffs to understand what the Trial Court meant when it held that recognizing their First Amendment rights would

“ ‘make the professed (practices) of religious belief superior to the law of the land . . .’ ”

The Plaintiffs do not know which of the laws is invoked—is it the First Amendment to the Constitution or is there some other law which appeared to the Trial Court to threaten the Republic. The Plaintiffs submitted in their Complaint and the Trial Court accepted this claim as true, that they are unable in good conscience to finance the war effort. They were of the belief, and they still are, that the First Amendment shows the way to give recognition to such conscientious belief because as Justice Murphy said in his dissenting opinion in the first *Jones v. City of Opelika* case, and which case was vacated and reversed

“Freedom of speech, freedom of the press, and freedom of religion all have a double aspect—freedom of thought and freedom of action. Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind. But even an aggressive mind is of no missionary value unless there is freedom of action, freedom to communicate its message . . .”

Justice Murphy went on to say in his dissent which later appears to be adopted by the majority that

“Liberty of conscience is too full of meaning for the individuals in this nation to permit taxation to prohibit or substantially impair the spread of religious ideas, even though they are controversial and run counter to the established notions of a community. If this Court is to err in evaluating claims that freedom of speech, freedom of the press, and freedom of religion have been invaded, far better that it err in being overprotective of these precious rights.”

Plaintiffs submit that the Trial Court's refusal to grant them their day in Court and preventing them to show if they can that to pay that part of their income tax that is used for the financing of the war effort is a violation of their free exercise of their conscientious approach to life, to man, and to that Supreme Being that some of the Plaintiffs call reverence for life, others call it the inner spirit—but all call it concern for human life.

The Plaintiffs submit that the Trial Court erred in dismissing the Complaint because it is the task of the Courts to remember what Justice Douglas said in *Girouard v. The United States of America*, 328 U.S. 61, 66 S.Ct. 826,

“The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power

higher than the State. Throughout the ages men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle."

Plaintiffs believe that the Trial Court failed to recognize that in the domain of conscience, there is a moral power higher than the State, and because of that it failed to inquire whether the exacting of war taxes from the Plaintiffs was in fact an accommodation of the demands of the State to the conscience of the Plaintiffs. As it was said in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178,

"Freedom of thought which includes freedom of religious belief is basic in a society of free men."

While it may be true that compelling the Plaintiffs to make financial contribution to the war effort may be the means or the vehicle for the "preservation of the Republic" but it will surely not lead to the preservation of "a society of free men." which was and is the underlying concept of the Constitution.

The First Amendment supports the claim of the Plaintiffs, and therefore, the dismissal of the Complaint was erroneous and a reversal is required.

(4) THE DISTRICT COURT ERRED IN ENTERING AN ORDER DISMISSING THE COMPLAINT AND HOLDING THAT THE RECOGNITION OF PLAINTIFFS' RIGHTS TO CONSCIENTIOUSLY REFUSE TO CONTRIBUTE TO THE WAR EFFORT BY PAYING TAXES WOULD BE TANTAMOUNT TO CAUSE THE DESTRUCTION OF THE REPUBLIC AND NOT HOLDING TO THE CONTRARY, THAT SUCH RECOGNITION COULD PREEMINENTLY BRING ABOUT THE PRESERVATION OF THE REPUBLIC.

The Trial Court in its Order, dismissing the Complaint, stated that

“To permit the avoidance of the payment of income taxes or a portion thereof, which in effect is what plaintiffs seek in this action for refund, . . . Government could exist in name under such circumstances.”

In emphasizing its misgivings, the Trial Court goes on to speak of the dire consequence of enforcing Plaintiffs' Constitutional right under the First Amendment as being the possible destruction of the Republic.

Looking upon the long history of the Bill of Rights as reported in the decisions of the Supreme Court and particularly the ever increasing respect shown for individual rights, one may be pacified that the honoring of the fundamental rights guaranteed by the First Amendment did, in fact, strengthen the Republic, and withal, by defending those values and ideals, this Nation was set apart from those which succumbed to the totalitarian ideology and to the paramountcy of the State over the individual. The refusal to subvert the liberties of the individual protected by the First Amendment is the force propelling the in-

dividuals to defend the Nation as being worthwhile to defend.

Plaintiffs submit that one can serve one's country other than by means of weapons, and in fact, they submit that upholding the ideals implicit in a democratic concept is a way to engage in the defense of one's country.

The Plaintiffs are supported in this contention by the highly respected opinion of those who gave their concern to the study of the basic documents of this country. The late Justice Cardozo wrote that the First Amendment embraces

“... a domain of free activity that may not be touched by government or law at all . . . By express provision of the constitution, (the individual) is assured freedom of speech and freedom of conscience or religion. These latter immunities have thus the sanctions of a specific pledge.” (The Paradoxes of Legal Science, p. 98 (1928).)

The late venerable Professor Meiklejohn was teaching us that while other constitutional provisions may be intended to strike a balance between authority and liberty, in the First Amendment the founders of the Republic placed all their weight on the side of liberty. The Constitution, says Professor Meiklejohn

“... does not give equal status to the duty of self-preservation and the duty of maintaining Political Freedom. On the contrary, our ‘experiment’ in self-government makes that freedom an absolute.” (Meiklejohn, “What Does the First Amendment Mean?” 20 University of Chicago Law Review, pp. 461, 479 (1953).)

While it is true that Professor Meiklejohn was not a lawyer which may be considered by some as a disadvantage but by others as an advantage, he was, nevertheless, supported in his interpretation of the Constitution by judges clearly trained to interpret that document. Justice Black echoed Professor Meiklejohn and said that the First Amendment provides that "Congress shall make no law" abridging the freedoms of religion, speech, press and assembly therein guaranteed,

"Neither as offered nor adopted is the language of the Amendment anything less than absolute."
(Justice Black, *The Great Rights*, p. 54 (Cahn, ed., 1963).)

Justice Douglas of the Supreme Court of the United States, speaking of the language in the First Amendment, believed that it expressed

"The mandate is in terms of the absolute . . . The prohibition is all-inclusive and complete. The word 'no' has a finality in all languages that few other words enjoy." (Douglas, *We the Judges*, p. 307 (1956).)

The Plaintiffs submit that even those who do not accept the concept of absolute when speaking of the First Amendment agree that it incorporates rights so basic

". . . that neither liberty nor justice would exist if they were sacrificed." (*Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149 (1937).)

However, either dissenting or concurring, the Justices of the Supreme Court agree

“... that the First Amendment is the keystone of our Government, . . .” (Justice Black dissenting, in *Dennis v. United States*, 341 U.S. 494, 580, 71 S.Ct. 857 (1951).)

They also agree that the rights guaranteed by the First Amendment are

“... basic and fundamental, and . . . so important to the preservation of the freedoms treasured in a democratic society.” (*Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476 (1965).)

West Virginia Board of Education v. Barnette, supra, expresses clearly the basic difference between the constitutionality of governmental action which may infringe upon the right of property and action limiting or impinging upon First Amendment rights. The Supreme Court said

“The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a ‘rational basis’ for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.”

The *Barnette* case also stands for the proposition that First Amendment rights

“... are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.”

The Plaintiffs submit that there is no showing and the Trial Court failed to ask for such showing by the Defendant that making use of Plaintiffs’ tax payment for constructive purposes would bring about

grave and immediate danger to the interest of the United States.

They also submit that they have the right under the Constitution to choose as they conscientiously are propelled to do, to support peaceful means of defense. The First Amendment guarantees to them the right to stand on their conscientious objection to finance a war which they cannot support, and therefore, the dismissal of their Complaint was in error which this Court ought to rectify by reversing the judgment of the Trial Court.

(5) THE DISTRICT COURT ERRED IN NOT HOLDING THAT THE PLAINTIFFS ESTABLISHED PRIMA FACIE THAT THEY BELIEVE THAT THEIR CONTRIBUTION TO THE WAR EFFORT TO THE EXTENT OF THEIR TAX PAYMENT MAY MAKE THEM RESPONSIBLE UNDER THE LONDON TREATY AND THE JUDGMENT OF NUREMBERG.

From the Order dismissing the Complaint, it is clear that the Trial Court held that the Plaintiffs established *prima facie* that they are holding to their beliefs sincerely and that their belief in non-payment of taxes for war purposes constitutes a sincere and religious tenet. The Court did not, and likely could not hold that such religious tenet is held by the Plaintiffs in the orthodox sense, but undoubtedly was held to be a religious tenet as defined in *United States v. Seeger*, 380 U.S. 163, 85 S.Ct. 850 (1965). There, Justice Clark, speaking for the Court, said that the test may be expressed,

“A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption . . .”

Justice Clark also pointed out that the above conclusion

“. . . avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets.”

Congressional intent, as the Plaintiffs submit, may be seen from the wording of Title 50 USCA App. § 451, which states that

“Nothing contained in this Title shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.”

The above Title also says that if a person

“. . . is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his Local Board to perform . . . such conscientious work contributing to the maintenance of the national health, safety or interest as the Local Board may deem appropriate.”

The Plaintiffs argue that unless one intends to impute to Congress an intent to classify such religious belief exempting some and excluding others, then the Plaintiffs are entitled to have their opposition to war in any form respected. In line with Title 50, *supra*, Plaintiffs, under these circumstances, may be called

upon that in lieu of their tax payment for financing the war they should in some manner contribute

“ . . . to the maintenance of the national health, safety or interest . . . ”

In line with the requirements of Title 50, and as the Order of the Trial Court shows, Plaintiffs were found to be conscientiously opposed to war in any form, and thus they were entitled to the granting of their prayer set forth in their Complaint.

Plaintiffs submit that they did establish *prima facie* that they are opposed to war in any form and further established without any contradiction that they truly believe that remaining silent and not opposing the war, will expose themselves to the charge of being guilty of violating the many provisions of Treaties to which the United States is a party, and also pertinent holdings of international law, among others the judgment of the Tribunal of Nuremberg. At this point, the Plaintiffs want to emphasize, as they did in their Complaint, that neither the Trial Court nor this Court are asked to determine the legality or illegality of the Vietnam or any other war. The only determination that they were asking is whether or not they, the Plaintiffs, hold sincerely said beliefs against their participation in war. Because of the Trial Court's holding as to the sincerity of Plaintiffs' belief and that their belief partakes of the character of religious tenets, the Plaintiffs were entitled to a declaration of their rights and to their day in Court. The denial by the Trial Court of both requires a reversal.

- (6) THE DISTRICT COURT ERRED IN NOT HOLDING THAT THE PLAINTIFFS WERE ENTITLED, BECAUSE OF THEIR SINCERE BELIEFS, TO BE EXEMPTED FROM CONTRIBUTING TO THE WAR EFFORT BY PAYING TAXES IN SUPPORT THEREOF PURSUANT TO THE VARIOUS INTERNATIONAL TREATIES AND COMMITMENTS CITED IN THE COMPLAINT.

Plaintiffs alleged in their Complaint and in support thereof argue now that whatever national interest may require and whatever proper means Congress may adopt to secure those requirements, the denial of the Plaintiffs' First Amendment rights is not one that can square with the Constitution nor with the international treaties to which United States is a party and with the various declarations made in support of such treaties. As it was said in *Robel*, supra,

“ . . . Congress must achieve its goal by means which have a ‘less drastic’ impact on the continued vitality of First Amendment freedoms.”

We do not believe that Congress intended or that the Constitution would permit such an intent to be carried out if it were to be opposed to the First Amendment rights of all the Plaintiffs. The Trial Court should have held that the Plaintiffs are exempted to contribute to the financing of the war effort because of their honestly held beliefs; that the international treaties and commitments represented a compelling force upon them.

The Trial Court erred because irrespective whether there is an immediate danger of any punishment being meted out to those who violate international treaties and International Law, nevertheless, the Supreme Court of the United States ever since *Ex*

parte Quirin, 317 U.S. 1, 63 S.Ct. 2, and before that defined and held punishable

“Offenses against the Law of Nations.”

Plaintiffs submit that the law applied to Admiral Yamashita may be applied to them too because in that case, *Application of Yamashita*, 327 U.S. 1, 66 S.Ct. 340, Chief Justice Stone, speaking for the Court held that an action of troops

“... whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent.”

Admiral Yamashita was punished because International Conventions

“... plainly imposed on petitioner (an alien commander of alien troops in war) who at the time specified was military governor of the Philippines as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.”

Plaintiffs submit that they recognize their obligation and truly believe that their duty is to abide by this obligation. It is clear to them that they had the affirmative duty to take such measures as were within their individual power. One of these measures is not to remain silent when they are called upon to contribute financially to the war effort, which effort they cannot conscientiously support.

The failure of the Trial Court to recognize and its failure not to hold that the Plaintiffs are exempt from the financing of the war effort, which they conscientiously oppose in any form, was a prejudicial error which requires reversal.

VI

CONCLUSION

For the foregoing reasons, the Order and the Judgment of the trial Court should be reversed.

Dated, Carmel, California,
July 22, 1968.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

FRANCIS HEISLER,
*One of the Attorneys
for Appellants.*

No. 22,801

IN THE
United States Court of Appeals
For the Ninth Circuit

NEILA A. AUTENRIETH, et al.,
Plaintiffs-Appellants,

VS.

JOSEPH M. CULLEN, District Director of
Internal Revenue Service, San Fran-
cisco, et al.,
Defendants-Appellees.

On Appeal from the Judgment of the
United States District Court for the
Northern District of California

BRIEF FOR THE APPELLEES

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Subject Index

	Page
Statement of the issue presented	1
Statement of the case	2
Summary of argument	3
Argument	5
The complaint was properly dismissed	5
A. Introduction	5
B. The allegations of the complaint taken as true nevertheless fail to state a claim upon which relief can be granted	6
C. Taxpayers have no standing to question the ex- penditure of federal funds	13
Conclusion	15

Table of Authorities Cited

Cases	Pages
Abington School Dist. v. Schempp, 374 U.S. 203	8, 9
Board of Education v. Allen, decided June 10, 1968 (36 U.S. Law Week 4538, 4541)	9
Braunfeld v. Brown, 366 U.S. 599	10
Crowe v. Commissioner, decided June 28, 1968 (68-2 U.S. T.C., par. 9444)	12
Everson v. Board of Education, 330 U.S. 1	7
Flast v. Cohen, decided June 10, 1968 (36 U.S. Law Week. 4601)	5, 13, 14
Follett v. McCormick, 321 U.S. 573	9
Frothingham v. Mellon, 262 U.S. 447	5, 13, 14

	Pages
Gallagher v. Crown Kosher Super Market, 366 U.S. 671 . . .	10
Girouard v. United States, 328 U.S. 61	10, 11
Kalish v. United States, pending on appeal (No. 22,886) . . .	5, 6
Murdock v. Pennsylvania, 319 U.S. 105	5, 9
Sherbert v. Verner, 374 U.S. 398	8, 10
United States v. Seeger, 380 U.S. 163	10
Williamson v. Lee Optical Co., 348 U.S. 483	11

Constitutions

United States Constitution:	
First Amendment	3, 4, 5, 6, 7, 14

Statutes

Internal Revenue Code of 1954:	
Section 7422 (26 U.S.C. 1964 ed., Section 7422)	2

Texts

Annot., 135 A.L.R. 279 (1941)	11
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cisco, et al.,
Defendants-Appellees.

**On Appeal from the Judgment of the
United States District Court for the
Northern District of California**

BRIEF FOR THE APPELLEES

STATEMENT OF THE ISSUE PRESENTED

Whether the District Court correctly dismissed an income tax refund suit, based on the claim that taxpayers, as conscientious objectors to war, are immune from taxation to the extent that tax revenue is appropriated to pay the cost of "the war in Viet-Nam."

STATEMENT OF THE CASE

Taxpayers instituted this action against the San Francisco District Director and the Commissioner of Internal Revenue to recover “such part of their respective taxes paid by them for the years 1965 and/or 1966 which is expended in support of the war effort.”¹ (R. 22.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. Taxpayers appeal from the dismissal of their complaint. (R. 59-63.) The jurisdiction of this Court rests on 28 U.S.C., Section 1291.

The complaint alleged that taxpayers are conscientious objectors to war “and because of such conscientious objection they may not be compelled to contribute to the cost of the war in Viet-Nam and in further consequence, the defendants ought to be ordered to reimburse the plaintiffs and each of them such part of the taxes paid by them for the year 1965 and 1966 which represents a proportional contribution to the war effort objected to by the respective plaintiffs.” (R. 19.) The Commissioner and District Director moved for dismissal of the complaint on the grounds that the court below was without jurisdiction over their persons (see footnote 1, *supra*) and the subject matter of the suit, and that the complaint

¹Under Section 7422(f) of the Internal Revenue Code of 1954, 26 U.S.C., Section 7422(f), tax refund suits must be brought against the United States and not particular officers of the Government. Although the complaint did not comply with Section 7422(f), the District Court treated it as if it had been “amended to name the United States of America as the proper party defendant.” (R. 59.)

failed to state a claim upon which relief could be granted. (R. 26.)

Judge Zirpoli dismissed the complaint for failure to state a proper claim for relief.² In reaching that result, the court assumed, “without deciding, that the belief in non-payment of taxes for war purposes constitutes a sincere and religious tenet.” (R. 59.) The Court concluded that the First Amendment does not provide immunity from the income tax which is “imposed on all citizens regardless of religious practices and affects the very life of the civil government under which we live.” (R. 60.)

SUMMARY OF ARGUMENT

Relying on the First Amendment’s protection of freedom of religion, taxpayers contend that the income tax is unconstitutional as applied to those who conscientiously object to war, insofar as Congress may appropriate and expend tax revenue for war or in connection with the Vietnam situation. The District Court correctly held that this claim presents no basis for relief. The dismissal of the complaint was required on that ground and also because taxpayers are in substance attacking the expenditure of federal funds without standing to do so.

1. Taxpayers set out no claim for relief because they fail to show how a tax imposed on income can in

²The District Court did not reach the other jurisdictional issues raised by the Government. (See R. 59.)

any way reach the Establishment or Free Exercise Clauses of the First Amendment. The Establishment Clause would be violated by a tax levied to support religious activities or institutions, but no such allegation is made in this case. The Free Exercise Clause would afford protection against a tax which burdens or regulates religious beliefs as such. For example, a license tax imposed on booksellers has been held unconstitutional as applied to religious colporteurs engaged in the distribution of religious literature. But a tax on income does not prevent or inhibit taxpayers from disseminating or holding their anti-war beliefs.

Taxpayers make the novel and fallacious argument that as a result of the statutory exemption from military service for conscientious objectors, a like exemption must, as a matter of constitutional law, be made available in respect of the income tax. To the contrary, there is no constitutional doctrine that requires Congress to enact a given exemption in respect of every statutory obligation imposed on citizens merely because it has relieved a specific class of persons from complying with one such obligation. It is one thing to compel an individual to take part physically in military service against his religious convictions and a wholly different matter to require him to do an act, such as paying taxes, which itself is not contrary to his religious beliefs and which has nothing to do with those beliefs. Congress may rationally relieve a conscientious objector from the duty of bearing arms without also relieving him of the duty to pay income taxes.

2. Taxpayers' grievance is not actually concerned with the income tax and its operation. Rather, they object to the appropriation and expenditure of federal funds in connection with Vietnam, although they do not contend that Congress is without constitutional power to legislate for that purpose. Disapproval of governmental policy—however conscientious—does not establish a First Amendment claim. Taxpayers, in failing to invoke a specific constitutional limitation on Congress' power to spend federal funds, have no standing to question the constitutionality of those expenditures under the Supreme Court's *Flast* and *Frothingham* decisions.

ARGUMENT

THE COMPLAINT WAS PROPERLY DISMISSED

A. Introduction

Like *Kalish v. United States*, pending on appeal to this Court (No. 22,886), the instant action was brought to prevent Congress from appropriating and expending tax revenues in connection with Vietnam. Taxpayers here, like the complainant in *Kalish*, do not and cannot allege that the tax in dispute is imposed on the exercise of a constitutionally protected activity in which they are now engaging or wish to engage. Compare *Murdock v. Pennsylvania*, 319 U.S. 105.³

³There, the Supreme Court held that a local license tax was unconstitutional in its application to religious colporteurs who were engaged in the distribution of religious literature, albeit accompanied by the solicitation of funds. The tax was found to burden the pursuit of a clearly religious activity.

They point to nothing either on the face of the Internal Revenue Code or in its operation that infringes their First Amendment rights to speak freely and to hold any belief. Nor do they maintain, in contrast to the complainant in *Kalish*, that Congress has exceeded its general power to expend federal funds; taxpayers (Br. 37) “emphasize, as they did in their Complaint, that neither the Trial Court nor this Court are asked to determine the legality or illegality of the Vietnam or any other war”. (See, also, R. 46.) Thus, both the income tax and Congress’ power to appropriate federal funds remain generally unchallenged.

Yet taxpayers’ position is that the income tax is in part unconstitutional as applied to individuals who conscientiously object to the war to the extent that Congress may decide to appropriate tax revenue for war. The District Court correctly held that this contention does not represent a claim upon which relief can be granted. In addition, we submit that taxpayers have no standing even indirectly to attack the expenditure of federal funds. Dismissal of the complaint was required on each of these grounds.

B. The allegations of the complaint taken as true nevertheless fail to state a claim upon which relief can be granted

The core of taxpayers’ position is that the First Amendment’s protection of freedom of religion exempts from the obligations of citizenship those who conscientiously oppose governmental acts, programs or legislation. If this were a sound thesis, an individual who religiously believed in racial segregation would be free to ignore the civil rights laws; a person

who passionately believed it to be immoral to take his property by taxation only to give it away to others through welfare, anti-poverty, and foreign aid programs could justly recover or refuse to pay his taxes. Thus, as the District Court recognized (R. 60), acceptance of taxpayers' constitutional view would destroy effective government and thereby put an end to the rights of all Americans—majority and minority alike.

At all events, religious liberty under the First Amendment does not grant immunity from otherwise valid legislation merely because an individual disagrees with governmental policy. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *." Obviously, taxpayers can place no reliance on the Establishment Clause. See *Everson v. Board of Education*, 330 U.S. 1, 15-16, in which Mr. Justice Black's opinion for the Court defined the scope of the prohibition against an establishment of religion:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. * * * No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. * * *

Taxpayers do not assert that the federal tax on income punishes them for their religious beliefs or disbeliefs; nor do they claim that the tax is levied to support religious institutions or activities. And were the income tax tangentially to offend religious convictions in some manner, it would not necessarily be unconstitutional under the test enunciated by the Supreme Court in *Abington School Dist. v. Schempp*, 374 U.S. 203, 222:

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.⁴

It cannot be said that the legislative purpose of the income tax or its primary effect is the advancement or inhibition of religion; it is entirely neutral on religion.

The Free Exercise Clause likewise affords no support whatever to taxpayers' constitutional theory. In *Sherbert v. Verner*, 374 U.S. 398, the Supreme Court stated (p . 402):

The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such, *Cantwell v. Con-*

⁴This test was recently reiterated and applied by the Supreme Court in *Board of Education v. Allen*, decided June 10, 1968 (36 U.S. Law Week 4538, 4539), to sustain the expenditure of tax funds for books to be used by students attending private sectarian schools.

necticut, 310 U.S. 296, 303. Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins*, 367 U.S. 488; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island*, 345 U.S. 67, nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock v. Pennsylvania*, 319 U.S. 105; *Follett v. McCormick*, 321 U.S. 573; cf. *Grosjean v. American Press Co.*, 297 U.S. 233. [Emphasis in original.]

Although this enumeration of the restraints on government action may not be totally exhaustive, it indicates the limits of the Free Exercise Clause: That clause counters burdens or inhibitions on activities or groups because of belief, and it prevents attempts to compel affirmation of a repugnant belief. Thus, "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion, *Abington School District v. Schempp*, 374 U.S. 203, 223 * * *." *Board of Education v. Allen*, decided June 10, 1968 (36 U.S. Law Week. 4538, 4541). In this connection, the Supreme Court in *Murdock v. Pennsylvania*, 319 U.S. 105, and *Follett v. McCormick*, 321 U.S. 573, observed that a generally imposed income tax cannot rationally have a coercive effect on religious practices or beliefs. Mr. Justice Douglas stated for the Court in *Follett v. McCormick*, *supra*, pp. 577-578:

The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial

burdens of government, including taxes on income or property. We said as much in the *Murdock* case, 319 U.S., p. 112. But to say that they, like other citizens, may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege.

Certainly, taxpayers cannot maintain that the income tax is in any way concerned with "beliefs as such" or denies them the right to continue to hold and, indeed, promote any of their beliefs. See *Sherbert v. Verner*, *supra*.⁵

Taxpayers (Br. 29-30, 35-36) rely on *Girouard v. United States*, 328 U.S. 61, and *United States v. Seeger*, 380 U.S. 163,⁶ for the view that the statutory exemption from military service for conscientious objectors, although it may not be constitutionally required, must now be applied to the payment of

⁵Even if a statute imposes an indirect burden on the free exercise of religion, which is not the case here, the statute will be sustained so long as it was enacted for the purpose and with the effect of pursuing a valid secular objective. *Braunfeld v. Brown*, 366 U.S. 599; *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617 (Sunday closing laws held valid as against the free exercise claims of Orthodox Jews who were compelled by religious convictions also to close their businesses on Saturdays).

⁶In *Girouard*, it was held that an alien who refused to bear arms because of religious scruples could not be denied citizenship. The issue was one of statutory construction and not a constitutional question. In the *Seeger* case, the Supreme Court read the statutory exemption from military service for conscientious objectors to include those who did not believe in the traditional religious concept of a Supreme Being, but whose conscientious objection was equally intense.

income taxes in order to avoid improper discrimination among categories of conscientious objectors. This constitutes an entirely novel notion that, if Congress defines an exempt class for one purpose, it becomes constitutionally bound to provide the same exempt status for every purpose or as to every statute. However, that proposition is neither realistic nor legally sound. It is one thing to compel a person to take part physically in combat or to wear a military uniform against his religious convictions and an entirely different matter to have him support his government in all all of its operations through the neutral act of paying taxes.⁷ Therefore Congress effects no invidious or arbitrary discrimination when it relieves a conscientious objector from bearing arms and requires others, whose consciences are likewise offended by the conduct of war, to meet all other obligations of citizenship including the payment of taxes. See *Williamson v. Lee Optical Co.*, 348 U.S. 483.

The distinction was made quite clear in the *Girouard* case (328 U.S. pp. 66-67):

This respect by Congress over the years for the conscience of those having religious scruples against bearing arms is cogent evidence of the meaning of the [naturalization] oath. *It is recognition by Congress that even in time of war one*

⁷We note that the common law has traditionally recognized a difference between the mere payment of money and other acts; it is settled that the sole remedy for breach of a personal service contract is monetary damages and not specific performance. See Annot., 135 A.L.R. 279 (1941).

may truly support and defend our institutions though he stops short of using weapons of war.
[Emphasis added.]

The statutory exemption from military service is thus limited to those whose religious scruples prevent them from doing particular personal acts—engaging in hostilities or military service. But the statutory exemption does not go to the payment of federal taxes, and taxpayers here make no claim that the payment of taxes is itself an act contrary to their religious beliefs.

All of this establishes, moreover, that taxpayers' grievance has nothing whatever to do with the income tax, but is an attack on Congress' expenditure of federal funds through separate legislation for a purpose admittedly within its constitutional authority (or at least not put in question in this case). Taxpayers' allegations simply do not set out a legal basis for holding the income tax unconstitutional on its face or as applied. See *Crowe v. Commissioner* (C.A. 8th), decided June 28, 1968 (68-2 U.S.T.C., par. 9444, p. 87,542), in which the court held (*ibid.*):

A taxpayer cannot, however, evade payment of his legal tax obligations on the basis of his dissatisfaction with the distribution of revenue. Congress alone is authorized to appropriate money to promote the general welfare and its determination within constitutional bounds is decisive. It is the function of the courts to interpret the statutes so as to promote and effectuate the disclosed intent of Congress. [Citations omitted.]

Only the Constitution and not taxpayers' personal disapproval can limit the authority of the Congress to appropriate funds for specific purposes.

C. Taxpayers have no standing to question the expenditure of federal funds

The Supreme Court, in *Flast v. Cohen*, decided June 10, 1968 (36 U.S. Law Week. 4601), last term reaffirmed *Frothingham v. Mellon*, 262 U.S. 447, which held that a federal taxpayer was generally without standing to challenge the constitutionality of an expenditure of federal funds. However, *Flast* decided that the principle of *Frothingham* is not applicable if a federal taxpayer alleges that a given enactment "exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." (36 U.S. Law Week., p. 4607.) The taxpayers in *Flast* were found to have standing to attack the constitutionality of Titles I and II of the Elementary and Secondary Education Act of 1965, P.L. 89-10, 79 Stat. 27, by their allegation that federal funds were being spent for the benefit of religious schools (see 36 U.S. Law Week., p. 4602) because the Establishment Clause "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power" (36 U.S. Law Week., p. 4607). From *Flast*, it is seen that in addition to status as a taxpayer it is necessary to point to (1) a constitutional limitation on Congress' powers which (2) relate specifically to the taxing and spending power.

Although taxpayers here make reference to the First Amendment, unquestionably a limitation on congressional power, they point to no First Amendment principle that prohibits the expenditure of federal funds in connection with Vietnam. As previously noted, taxpayers expressly state that they make no claim that Vietnam spending is unconstitutional *per se*. Moreover, in contrast to the taxpayers in *Flast*, taxpayers here do not allege that Vietnam outlays in whole or in part are made for the benefit of religion or religious institutions contrary to the Establishment Clause, nor do they allege that such expenditures coerce them in the exercise of their religious practices. Taxpayers rely solely on the allegation that they conscientiously object to congressional support for our involvement in Vietnam, but they articulate no theory by which the First Amendment—solely because of the depth of their feeling on this issue—may be seen as a restraint on congressional action. Thus, for much the same reasons that taxpayers fail to state a proper claim for relief in connection with the operation of the income tax (as to which they do have a financial interest sufficient to establish standing), taxpayers are plainly without standing to question the constitutionality of Vietnam outlays under the *Flast* and *Frothingham* cases.

CONCLUSION

For these reasons, the judgment of the District Court should be affirmed.

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August, 1968.

No. 22,801

IN THE

United States Court of Appeals
For the Ninth Circuit

NEILA A. AUTENRIETH, et al.,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court
for the Northern District of California

APPELLANTS' REPLY BRIEF

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Subject Index

	Page
Introductory to the Argument	1
Argument	3

I

The distinction drawn by the appellee between physical participation in war and contribution to the war effort by other means such as payment of taxes is an artificial one and represents, in fact, an invidious and arbitrary discrimination in disfavor of the appellants	3
--	---

II

Compelling appellants to contribute to the war effort by payment of taxes deprives them of their right to maintain their conscientious objection to war and thus interferes with their free exercise of their religious beliefs contrary to the First Amendment	12
Conclusion	18

Table of Authorities Cited

Cases	Pages
Board of Education v. Allen, 36 U.S. Law Week 4538	16
Girouard v. United States, 328 US 61	17
Perry Bowen Moore v. United States, 217 F 2d 428, 348 US 966, 75 S Ct 530	4, 5, 6, 7, 8, 9, 11, 12, 16
United States v. Richard Harshman, 371 US 938, 75 S Ct 318	11, 12, 16
United States v. Malcolm Parker, 307 F 2d 585 (7th Cir.)	10, 11, 12, 16
United States v. Van Hook, 284 F 2d 489 (7th Cir.)	9, 11, 12, 16
Witmer v. United States, 348 US 375, 75 S Ct 392	8, 9

Codes

50 USC 456(j)	16
-------------------------	----

Texts

M. E. Hirst, The Quakers in Peace and War, p. 395	14
William Rotch, Vide Memorandum, 1916	13

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VS.	
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<i>Appellee.</i>	

**Appeal from the United States District Court
for the Northern District of California**

APPELLANTS' REPLY BRIEF

INTRODUCTORY TO THE ARGUMENT

The United States, Appellee in this case, presents a two-pronged argument in support of its contention that the dismissal of the Complaint by the District Court was proper. The first contention is expressed on page 11 of the Government's Brief to the effect that

“It is one thing to compel a person to take part physically in combat or to wear a military uniform against his religious convictions and an entirely different matter to have him support his government in all of its operations through the neutral act of paying taxes.”

As we shall show hereafter, under the circumstances set forth by the Complaint, the paying of taxes is not a neutral act, and we shall also show that the Appellee's conclusion based on a faulty premise must by necessity become faulty and the fact is that it is to do violence to the spirit of the Constitution to say that:

“ . . . Congress effects no invidious or arbitrary discriminations when it relieves a conscientious objector from bearing arms and requires others, whose consciences are likewise offended by the conduct of war, . . . ”

if the latter group is forced to participate in war by means of payment of war taxes.

The second contention of the Government is that Appellants failed to articulate a

“ . . . theory by which the First Amendment—solely because of the depth of their feeling on this issue—may be seen as a restraint on congressional action.”

We believe that our original Brief did articulate a theory contrary to Appellee's contention. However, in our further argument, we will re-articulate the same, particularly because our original argument was bot-tomed not “wholly” on Appellants' depth of feeling, but rather it placed their conscientious objection to war in any form into the center of their moralistic religious concept.

ARGUMENT**I**

THE DISTINCTION DRAWN BY THE APPELLEE BETWEEN PHYSICAL PARTICIPATION IN WAR AND CONTRIBUTION TO THE WAR EFFORT BY OTHER MEANS SUCH AS PAYMENT OF TAXES IS AN ARTIFICIAL ONE AND REPRESENTS, IN FACT, AN INVIDIOUS AND ARBITRARY DISCRIMINATION IN DISFAVOR OF THE APPELLANTS.

Appellee argues that it is permissible, and in fact, proper to give statutory exemption from military service to those whose religious scruples prevent them from doing particular personal acts—engaging in hostilities or military service. They further argue that the statutory exemption does not go to the payment of federal taxes or those parts thereof which go to support the war. Appellee also argues (p. 12 of their Brief) that the Appellants

“ . . . here make no claim that the payment of taxes is itself an act contrary to their religious beliefs.”

As to the latter statement, we respectfully disagree, and state to the contrary, that the whole tenor of our Opening Brief centered upon the claim that payment of war taxes by Appellants represents their direct participation in war and their opposition thereto is the center of their moral and religious beliefs.

While the United States here argues that there is a basic distinction between contribution to the war extended in the form of such personal acts as engaging in hostilities or wearing a military uniform and other kinds of personal contributions, strangely or not so

strangely, the United States heretofore argued consistently to the contrary, and in fact, it was able to convince the Courts that no such distinction can be made. In the case of *Perry Bowen Moore v. United States*, 217 F 2d 428, 348 US 966, 75 S Ct 530, the United States successfully argued that one may not contribute to the war effort by working as a laborer in a candy factory which sells part of its products to the Armed Forces without losing his status as a conscientious objector.

Perry Moore's claim as a conscientious objector was denied by his Selective Service Board even though it was admitted that his religious training and beliefs clearly brought him within the purview of the Congressional grant of exemption. The church to which he belonged (the Harshmanite Church of Sullivan, Illinois) was recognized by the Government to be a fundamentalist pacifist church. It was recognized that the church's pacifist position brought about antagonism towards it and its members on the part of the community, and the antagonism during the First World War grew to such an extent that the Harshmanite Church members were unable to obtain employment in the community. To keep alive, some members organized a little factory, making ladies' aprons, candy, and later, garden tractors and implements thereto. The factory employed both church and non-church members and among the former was Perry Moore, who was working as a common laborer. During World War II, the candy department of the establishment was unable to obtain Government allotments of

sugar unless it agreed to sell part of its products to the Armed Forces. It did sell approximately 4% of the candy products to the Air Force which put the candy so obtained into emergency survivor kits in its planes. This church industry also sold ladies' dresses to be used by the female members of the Armed Forces. Under the above circumstances, the United States Court of Appeals for the Seventh Circuit, in its holding of December 9, 1954 (*supra*) concluded that Moore's claim for exemption as a conscientious objector may be properly denied by Selective Service on the ground that

“His church on whose tenets his claim of exemption rests, though devoted to pacifist doctrines, *contributed to the war efforts of this country by manufacturing supplies and equipment for the Armed Forces.*” (emphasis ours)

By so holding, the Court of Appeals of the Seventh Circuit agreed with the Government's contention that no such distinction can be made between contributions to the war effort as is now urged by Appellee. In fact, the impact of the Government's argument in the *Moore* case and the decision of the Court of Appeals is plain, and that is that a **conscientious objector to war must not**—on penalty of forfeiting his previous status as a conscientious objector—contribute to war in any form, such as paying that part of his taxes that is used for the purchase of military equipment or is used for the payment to military personnel.

The position taken by the United States in the *Moore* case appears clearly from its Brief before the

Supreme Court of the United States (No. 521, October term, 1954, 348 US 966). The Government contended that *Moore* was denied conscientious objector status because

“His religious community had no compunction against acting as a war contractor for the Government during World War II, and apparently was content to profit from the war situation as a direct supplier to the war effort. *Such willingness to cooperate toward the prosecution of the war is entirely inconsistent with conscientious objection to a non-combatant participation in war in any form.*” (emphasis added)

Appellants submit that their contribution of tax money to buy military equipment is just as inconsistent with their claim as conscientious objectors as was claimed by the United States that *Moore's* working as a common laborer was in the case heretofore cited. Appellants submit that the contribution of tax money to war is more direct since it is made by the individual himself, while a common laborer as *Moore* was has no say-so about the factory supplying its customers.

(The *Moore* case was reversed *per curiam* on other grounds, namely that he and his witnesses tendered by him declined, because of religious scruples against oath-taking, to use the word “solemnly” in affirming to tell the truth. The Trial Court refused to permit them to testify. The Supreme Court held that there is no requirement that the word “solemnly” be used in the affirmation, and therefore the judgment of conviction was reversed.)

The Government recognized Moore's sincerity as did the Trial Court in the instant case recognized for the purpose of the order dismissing the Complaint

“ . . . that the belief in non-payment of taxes for war purposes constitutes a sincere and religious tenet.”

About *Moore* and his church, the Government's Brief before the Supreme Court of the United States, (348 US 966, 75 S Ct 530), stated:

“He and his church were opposed to force. He and his colleagues never struck a blow in anger or in self-defense. They held no malice for harm done to them by others. When their congregation was fired upon during a religious meeting, none of the members appeared to testify against the would-be murderers. They submit quietly and without reprisal to indignities, insults and even assaults.”

After thus recognizing the posture taken by the church and church members as total opposition to war, the Government turned, as it were Janus' face, and contended that Moore, a member of the church, working as a common laborer in the factory which supplied 4% of its candy products to the Armed Forces of the United States, under compulsion was nevertheless

“ . . . engaged in supplying material under Government contract for shipment to the Armed Services. **His position was no less proximate to the fighting than any stateside troops of the Supply Services.**” (emphasis added)

The contention of the United States in the *Moore* case and the decision of the Court of Appeals for the

Seventh Circuit (217 F 2d 428) forced a conclusion that a conscientious objector must refuse to make any contribution to war and must also repudiate any willingness to do so. He must refuse to pay moneys for war. If he fails to do so, he forfeits his right to claim exemption to military service. That he must repudiate any willingness to make contribution to the war effort may be seen from the Government's argument in the *Moore* case where the young factory worker was chastised by the Government because

“... at no time has he repudiated the stand taken by his church in the manufacture of war supplies. . .”

and the Government concluded that he was not entitled to a classification as a conscientious objector.

The Supreme Court of the United States seems to be of the same opinion as it appears from *Witmer v. United States*, 348 US 375, 75 S Ct 392. *Witmer* refused to be inducted in the Armed Forces after his claim for exemption as a conscientious objector was denied by his Local as well as by his Appeal Board. The District Court found him guilty of refusing to obey the order of induction, and the conviction was upheld by the Supreme Court because his sincerity as a conscientious objector was doubted

“Although he asserted his conscientious objector belief in his first exemption claimed, in the same set of papers he promised to increase his farm production and ‘contribute a satisfactory amount for the war effort’. Subsequently, he announced ‘the boy who makes the snowball is just as responsible as the boys who throw them.’”

The Supreme Court, while not informing us whether it agreed with the first or the second of *Witmer's* quoted statements above, concluded

“... these inconsistent statements in themselves cast considerable doubts on the sincerity of petitioner's claim ...”

of being a conscientious objector.

Appellants here say with *Witmer* that

“... the boy who makes the snowball is just as responsible as the boys who throw them.”

Because of that they proposed in their Complaint to maintain a consistent position by declaring that they are unable to contribute that part of their taxes which are used for war. By doing so, they hope to escape the burden that would and undoubtedly could be placed upon them by the *Witmer* decision which is so obviously applicable here.

The United States took the position now maintained by the Appellants in the case of *United States v. Van Hook*, 284 F 2d 489 (7th Cir.) (reversed on other grounds, 365 US 609). The defendant *Van Hook* was an employee of the same factory and member of the same church to which *Moore* belonged, and there the Government argued that the Local Board was justified in denying *Van Hook's* classification as a conscientious objector because of his willingness to work for the church enterprise which produced

“... WAC uniforms, candy for army rations ...”

The Government of the United States, Appellee here, consistently maintained the position that is now

taken by the Appellants here and which is not hotly contested by the Appellee.

In the case of *United States v. Malcolm Parker*, 307 F 2d 585 (7th Cir.) the Government contended that *Parker* was justly deprived of his conscientious objector classification because he too was willing to work as a laborer

“ . . . for Community Industries Ltd., a Harshmanite enterprise which produces WAC uniforms, candy for army rations . . . ”

and that *Parker* subscribed to the belief and opinions of the Harshmanites. The Government convinced the Seventh Circuit that the District Court did not err in deciding that there was a basis-in-fact for the denial of an objector classification, and therefore, his induction order was valid and his refusal to abide by the order was properly punished.

Parker filed a Petition for Writ of Certiorari in the Supreme Court of the United States under No. 516, October Term, 1962, (371 US 938, 83 S Ct 319). The Government of the United States filed its Brief in Opposition and stated, among others, that on the basis of the Trial record, it appeared

“ . . . that although Community Industries Ltd. (for whom *Parker* worked) does not manufacture munitions in the ordinary sense of the word, they do manufacture other items for military consumption such as tents, WAC uniforms, candy for rations . . . and other items . . . The registrant concluded by verifying that all of the above beliefs and opinions of the Harshmanites, in general, are also his own personal beliefs and

opinions.” (page 4 of United States of America’s Brief in Opposition)

The Government’s Brief in Opposition also stated that *Parker* contended that

“... the goods that we manufactured for use in the Army or Navy could be used by civilians too. The goods that we manufacture is not directly involved in killing and fighting.” (page 4)

The Government also contended that there was a

“... basis in fact for petitioner’s I-A-O classification (and that) was his admission before the Departmental hearing officer that Community Industries for which he worked manufactured tents, WAC uniforms, candy for army rations . . .” (page 7)

To sustain its contention that the Writ of Certiorari ought not to be granted the Government relied, among others, on *United States v. Van Hook* (supra), and *United States v. Moore* (supra), and upon such reliance asked the Supreme Court that the Petition of *Parker* for a Writ of Certiorari be denied.

Exactly the same argument was presented by the Government in the case of *United States v. Richard Harshman*, 371 US 938, 75 S Ct 318. After the Supreme Court granted certiorari in both cases (supra), the United States suggested to the Supreme Court (it may be such suggestion was made to avoid the determination of the issue) that the judgment be vacated and the cases of *Parker* and *Harshman* be remanded to the United States District Court for the Northern District of Illinois with instructions to dismiss. The

Supreme Court acted on the suggestion and remanded the cases to the District Court to dismiss (372 US 607; 83 S Ct 955 and 372 US 608; 83 S Ct 955). By remanding the *Parker* and *Harshman* cases to the District Court for dismissal without remanding it to the Court of Appeals to vacate its judgment, the decisions of the Seventh Circuit (*Moore*, 217 F 2d 428, *Van Hook*, 284 F 2d 489, *Parker*, 307 F 2d 585, and *Harshman*, 307 F 2d 590) still stand for the proposition that one who claims to be conscientiously opposed to war cannot make any contribution to the war effort, such as paying his taxes used for the war, and therefore, this Court ought to hold that the Trial Court erred in dismissing the Complaint.

II

COMPELLING APPELLANTS TO CONTRIBUTE TO THE WAR EFFORT BY PAYMENT OF TAXES DEPRIVES THEM OF THEIR RIGHT TO MAINTAIN THEIR CONSCIENTIOUS OBJECTION TO WAR AND THUS INTERFERES WITH THEIR FREE EXERCISE OF THEIR RELIGIOUS BELIEFS CONTRARY TO THE FIRST AMENDMENT.

Appellee contends (pp 3 and 4 of Brief) that the Appellants failed

“... to show how a tax imposed on income can in any way reach the Establishment or Free Exercise Clauses of the First Amendment.”

Appellee fails to understand or pretends to an inability to do so, that compelling Appellants to pay such substantial part of their taxes which is used for the

war effort does, in fact, strike at the very core of their conscientious objector's religious tenet.

It may be helpful to the Court to recall the experience of an Eighteenth Century Quaker, William Rotch, who incidentally was the owner of the three ships which brought the famous cargo of tea to Boston in 1773. He was not only a large ship owner but was also the chief proprietor of Nantucket whaling fleet.¹ Rotch had taken a large stock of muskets and bayonets in payment of a debt; the muskets he sold as fowling-pieces to his whalers to shoot game and sea fowl in their coasting voyages. The bayonets he refused to sell. At the outbreak of the war both British and Americans wished to get hold of his stock. The American authorities sent over to requisition them, but Rotch refused, and said:

“The time had now come to support our testimony against war or forever abandon it . . . My reason for not furnishing the bayonets were demanded, and I answered: ‘As this instrument is purposely made and used for the destruction of mankind and I cannot put into one man’s hand to destroy another that which I cannot use myself in the same way, I refuse to comply with thy demand.’ ”

This Quaker's refusal to contribute to the war effort brought about threats to his life but he remained unmoved and as for the bayonets, he said:

¹Vide Memorandum written by William Rotch in the Eightieth year of his age (printed by Houghton Mifflin Co., Boston and New York, 1916).

“I would gladly have beaten them into pruning hooks. As it was, I took an early opportunity of throwing them into the sea.”

For this he was summoned before a court-martial where he expressed his position and as Mr. Rotch recalls it in his memoirs

“The chairman of the committee, one Major Hawley, a worthy character, then addressed the committee, and said: ‘I believe Mr. Rotch has given us a candid account of the affair, and every man has a right to act consistently with his religious principles. But I am sorry we cannot have the bayonets for we want them very much.’ The Major was desirous of knowing more of our Friends’ principles, on which I informed him as far as he inquired. One of the committee (Judge Parr), in a pert manner, observed: ‘Then your principles are passive obedience and non-resistance.’ I replied: ‘No, my friend, our principles are active obedience and passive suffering.’ I passed through no small trial on account of my bayonets.”²

The Appellants say as Mr. Rotch said

“The time had now come to support our testimony against war or forever abandon it . . .”

because contrary to Appellee’s contention, Appellants maintain that compelling them to pay their tax money to purchase “bayonets” nullifies their conscientious opposition to the war which is the core of their relig-

²M. E. Hirst, *The Quakers in Peace and War*, London: The Swarthmore Press Ltd., Ruskin House, 40 Museum Street, W. C. I, New York: George H. Doran Company, p. 395.

ious beliefs. Contrary to Appellee's contention that Appellants being forced to pay for war taxes does not more than simply burden the exercise of their conscientious objection, but withal it deprives this conscientious posture of any meaning. In fact, as we pointed out in our Opening Brief (p 17) the exaction from Appellants and the use of a large part of their taxes for the war effort is

“a tax laid specifically on the exercise . . .”

of their religious beliefs.

The Appellants contend that it is a question of fact for them to establish that support of war efforts through the use of their tax money does truly prevent the exercise of their conscientious objection and religious tenets, and therefore, it was an error on the part of the Trial Court to deprive them of their duty in Court, and because of that error, a reversal is required by this Court.

It may not be amiss to analyze Appellee's position which seems to be the following: If a tax is levied in a manner which prevents or interferes with the conventional expression of religious beliefs such as going to church or partaking in religious rituals, the exaction of the tax would be unconstitutional. However, when religious belief is more subtle and may not be found in the conventional ritual such as the posture of the Appellants, then the tax becomes proper and the Court may not interfere with such exaction. However, as we have shown in our original Brief (pp 22 and 31 ff) this is not a distinction that can be drawn under the command of the First Amendment.

While the Appellee contends that the exemption of conscientious objectors from duty of bearing arms is a Congressional grant, Appellants contend that this grant is nothing more but an expression by Congress of an already pre-existing constitutional right. They are bold to say that if Congress were to repeal the law (50 USC 456 (j) as amended) granting exemption for military service for conscientious objectors, then undoubtedly our Courts under the command of the First Amendment would find that the right to such exemption exists without Congressional enactment. It appears to us that Appellee agrees with the above contention when it says (p 11 of its Brief) that

“It is one thing to compel a person to take part physically in combat or to wear a military uniform against his religious convictions . . .”

The distinction thereafter attempted to be drawn by the Appellee is without meaning under the First Amendment, because there is no difference between supporting the war effort by physical combat or by other means as we set forth hereinabove on the basis of the Court decisions in the *Van Hook*, *Moore*, *Parker* and *Harshman* cases.

Appellee points to the *Board of Education v. Allen* (36 U.S. Law Week 4538, 4541), wherein it is said

“... it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion, *Abington School District v. Schempp*, 374 U.S. 203, 223***.”

Appellants believe that they did heretofore, both in their original as well as in their Reply Brief, show that the exaction of war taxes from them has a coercive effect upon the practice of their conscientious objection, and in fact, makes such objection which is their religious tenet, wholly meaningless.

Appellee cites *Girouard v. United States*, 328 US 61 and emphasizes the holding by the Supreme Court to the effect that

“It is recognition by Congress that even in time of war one may truly support and defend our institutions though he stops short of using weapons of war.”

That is what Appellants contend. They contend first that exacting from them that part of the income tax which buys “bayonets” is a complete suppression of their free exercise of religion. Secondly, they contend, as they did in their Opening Brief that the Republic will stand, in fact, may increase in strength and posture, if they are permitted, as they are ready to do, to support and defend our institutions by means other than the use of weapons of war, such as contributions to the purchase of implements of war.

CONCLUSION

The Appellants submit that for the reasons set forth in their Opening Brief and for the reasons herein set forth, the Order of the Trial Court dismissing the Complaint ought to be reversed and the case be remanded to the Trial Court so that the Appellants may have their day in Court.

Dated, Carmel, California,
October 4, 1968.

Respectfully submitted,
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